No. 91-522-CFX
Status: GRANTED

Title: Saudi Arabia, King Faisal Specialist Hospital and Royspec, Petitioners
v.
Scott Nelson, et ux.

Docketed:
September 26, 1991

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Johnson Jr.,Everett C.

Counsel for respondent: Garment,Leonard, Duarte,Jorge A.

Entry	Date	Note	Proceedings and Orders
1	Sep 26 1991	G	Petition for writ of certiorari filed.
3	Oct 23 1991		Brief of respondents Scott Nelson, et ux. in opposition filed.
2	Oct 30 1991		DISTRIBUTED. November 15, 1991
4	Nov 6 1991	X	Reply brief of petitioners Saudi Arabia, et al. filed.
5	Nov 18 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	May 18 1992		Brief amicus curiae of United States filed.
6	May 20 1992		REDISTRIBUTED. June 5, 1992
9	May 27 1992	X	Brief of respondents in reply to the brief of the United States as amicus curiae filed.
10	Jun 8 1992		Petition GRANTED.
			**********
12	Jul 8 1992		Order extending time to file brief of petitioner on the merits until July 31, 1992.
13	Jul 31 1992		Joint appendix filed.
14	Jul 31 1992		Brief of petitioners Saudi Arabia, et al. filed.
15	Jul 31 1992		Brief amicus curiae of United States filed.
16	Aug 13 1992		Record filed.
		*	Original proceedings U.S. Court of Appeals, Eleventh Circuit and U. S. District Court,S. Dist. Fla. (1 Box)
17	Aug 17 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Aug 17 1992		Order extending time to file brief of respondent on the merits until September 8, 1992.
20	Sep 8 1992		Brief of respondents Scott Nelson, et ux. filed.
21	Sep 8 1992	G	Motion of Human Rights Watch for leave to file a brief as amicus curiae filed.
22	Sep 8 1992	G	Motion of International Human Rights Law Group, et al. for leave to file a brief as amici curiae filed.
23	Sep 9 1992		LODGING by respondents. One copy of decision of Social Security Administration In Re: Case of Scott J. Nelson.
24	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Oct 5 1992		Motion of Human Rights Watch for leave to file a brief as amicus curiae GRANTED.
26	Oct 5 1992		Motion of International Human Rights Law Group, et al. for leave to file a brief as amici curiae GRANTED.
27	Oct 8 1992		Reply brief of petitioners filed.

No. 91-522-CFX

Entry	Date	Note	Proceedings and Orders
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91-522
No. 91-

IN THE
Supreme Court of the United States
October Term, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC
Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether United States courts have jurisdiction under the commercial activity exception in the Foreign Sovereign Immunities Act to review inherently sovereign law enforcement activities of a foreign state carried out in that country.

2. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit challenging the conduct of a foreign state where the commercial activity of that foreign state in the United States is unrelated to the noncommercial conduct forming the basis of the suit.

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IN THE

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October Term, 1991

No. 91-

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Kingdom of Saudi Arabia, King Faisal Specialist Hospital, and Royspec,[1] Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), and is set forth in the Appendix hereto at 1a. The opinion of the United States District Court

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[1]In compliance with Rule 29.1 of the Rules of this Court, Petitioners represent that the Kingdom of Saudi Arabia is a foreign state and that King Faisal Specialist Hospital and Royspec are owned by Saudi Arabia.

for the Southern District of Florida, reversed by the Eleventh Circuit, has not been reported. It is set forth in its entirety in the Appendix hereto at 18a.

GROUNDS FOR JURISDICTION

The Eleventh Circuit issued its decision on February 21, 1991. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc. The petition was denied on July 1, 1991. In accordance with Rule 13.3 of this Court, this petition for a writ of certiorari was timely filed within ninety days of the date rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); 28 U.S.C. § 1602 *et seq.*; and 28 U.S.C. §§ 1330 and 1331.[2]

STATUTES INVOLVED

The relevant portion of the Foreign Sovereign Immunities Act is codified at 28 U.S.C. § 1605(a)(2) and states, "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ."

STATEMENT OF THE CASE

Respondents, Scott Nelson and his wife Vivian Nelson,[3] filed this lawsuit against the Kingdom of Saudi Arabia, a foreign

[2]Petitioners note that the Eleventh Circuit's decision denying sovereign immunity in this case is reviewable under the collateral order doctrine as established in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990), and cases cited therein. *See also Mitchell v. Forsyth*, 472 U.S. 511 (1985) (immunity includes immunity from trial).

[3]"Respondent" as used in the singular herein shall refer to Scott Nelson only, unless otherwise indicated, because Vivian Nelson's claims are entirely derivative.

state; King Faisal Specialist Hospital (KFSH or the "Hospital"), a government-owned hospital in Riyadh, Saudi Arabia; and Royspec, the Hospital's purchasing agent in the United States. Respondent seeks to recover for personal injuries allegedly inflicted by Saudi law enforcement officials in the course of his arrest and imprisonment in Saudi Arabia in September and October 1984. At the time of his arrest, Respondent was employed in Saudi Arabia as a monitoring systems engineer at the Hospital. He had previously been employed by an American corporation in Saudi Arabia.

During a respite in the United States from his work in Saudi Arabia, Respondent saw the Hospital's advertisement for an opening in Riyadh. The Hospital Corporation of America (HCA), a privately owned American corporation under contract with Saudi Arabia to assist in recruitment for the Hospital, had placed the advertisement.

Upon returning to Saudi Arabia, Respondent submitted an application for the position of monitoring systems engineer to the Hospital. In his application for employment, Respondent falsely represented that he was a graduate of the Massachusetts Institute of Technology (M.I.T.). During the application process he also submitted a forged M.I.T. diploma to the Hospital. Respondent subsequently had two interviews in Saudi Arabia for the position with the Hospital. In November 1983, while on a brief trip back to the United States, Respondent received an offer for the position in Saudi Arabia and executed an employment contract. One month later, he attended an orientation session conducted by HCA in Tennessee before flying to Saudi Arabia to commence his employment at the Hospital.

Respondent resided in Saudi Arabia and worked at the Hospital for several months without incident. This uneventful period ended when he allegedly discovered a safety violation

at the Hospital. He allegedly reported the violation to various officials of the Hospital and to other officials of the Saudi government. Around this time, officials at the Hospital discovered that the diploma Respondent had submitted to the Hospital was a forgery. In September 1984, Saudi law enforcement officials arrested and imprisoned Respondent on charges that he had falsified his employment credentials by submitting the forged M.I.T. diploma.[4] Respondent spent thirty-nine days in detention before the Saudi government, at the request of a member of the United States Congress, ordered his release.[5]

Respondent alleges that after his arrest, he was tortured in retaliation for reporting a safety violation at the Hospital. He further alleges battery, "unlawful detainment", wrongful arrest and imprisonment, "inhuman torture", "disruption of normal family life", and "mental anguish" as well as negligent failure to warn of the risk of imprisonment and torture. The complaint also includes Respondent Vivian Nelson's derivative claims based on these allegations. The complaint asserts that subject-matter and personal jurisdiction are conferred by 28 U.S.C. § 1331; the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*; Florida's long-arm statute applicable to non-residents doing business in Florida, Fla. Stat. § 48.181; and the Alien Tort Statute, 28 U.S.C. § 1350.

Respondent relied exclusively on clause one of the "commercial activity exception" to foreign sovereign immunity to

[4]It is a crime in Saudi Arabia to make a false statement to the government, just as it is a crime in the United States. *See, e.g.*, 18 U.S.C. § 1001 (1988).

[5]Almost four years elapsed between Respondents' return to the United States and their filing suit. At all times and still today, Saudi Arabia has assured Respondents and their counsel that Saudi Arabia will provide them with visas and guarantee safe passage to pursue the adjudication of their claims in the appropriate forum in Saudi Arabia. To date, Respondents have declined the offer.

confer jurisdiction on the district court.[6] The district court considered whether Respondent's claims were "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (1988). The court concluded that Respondent's claims against Saudi Arabia and the Hospital did not meet this standard for two reasons.

First, a foreign sovereign engages in commercial activity in the United States within the meaning of the FSIA only if its commercial activity has "substantial contact with the United States." *Id.* §1603(e). The district court found that the commercial activity of the Hospital and the Kingdom did not have "substantial contact with the United States," even if the acts of HCA with respect to Respondent were imputed to Petitioners *Nelson v. Saudi Arabia*, No. 88-1791, slip op. at 6 (S.D. Fla. Aug. 11, 1989), App. at 22a. The district court emphasized that "[Respondent] was interviewed by KFSH in Saudi Arabia, . . . the employment contract was to be performed in Saudi Arabia," and the definition of "substantial contact" in the FSIA requires more significant activity than the "happenstance" of signing an employment contract in Florida. *Id.*

The district court also concluded that even if the indirect recruitment activities in the United States were viewed as a

[6]Clause one confers jurisdiction "in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (1988). Plaintiffs do not rely upon the second clause of § 1605(a)(2) which provides jurisdiction over "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2), clause 2. Clause two reaches only those acts in the United States "which in and of themselves are sufficient to form the basis of a cause of action." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6618 [hereinafter House Report]. *See also Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1104 n.16 (1982) (holding that a breach-of-contract claim could not be maintained under clause two unless the breach took place in the U.S.), *cert. denied*, 464 U.S. 815 (1983).

"substantial contact", Respondents' claims were not "based upon" that commercial activity as required by the FSIA. The court held that the statutory requirement that an action be "based upon" a foreign sovereign's commercial activity requires a "nexus" between the claims alleged in the complaint and the commercial activity in the United States. *Id.* at 8, App. at 24a. The court reasoned that although there might have been a nexus between the commercial acts in the United States and the complaint "if [Respondent] had alleged some type of commercial cause of action arising from the employment contract," this was not the case: the "gravamen of [Respondent's] complaint . . . is an action for personal injuries." *Id.* The court found that the only "nexus" was "but for his recruitment in the United States, [Respondent] would not have taken the job, been arrested, and suffered the personal injuries" — a connection "far too tenuous to support jurisdiction over a foreign sovereign." *Id.*

Similarly, the district court found that Respondent's claim for negligent failure to warn was not sufficiently connected to Petitioners' commercial acts in this country. The court noted that Respondent had not alleged that the recruitment activities were undertaken "for the purpose of imprisoning and torturing U.S. citizens." *Id.* at 9, App. at 25a.

The parties did not dispute that Royspec's commercial activity, purchasing equipment and medical supplies, has "substantial contact with the United States." *Id.* at 4, App. at 21a. The district court found, however, that "[t]he only connection between Royspec and [Respondent] is that [Respondent] was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." *Id.* at 7, App. at 23a. The court, therefore, concluded that there was "absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint." *Id.* at 7-8, App. at 23a-24a.

The Court of Appeals for the Eleventh Circuit reversed. *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), App. at 17a. It held that the commercial activity exception confers jurisdiction over all the Petitioners for all of Respondents' claims. The court rejected Petitioners' contention that the FSIA precludes jurisdiction over these claims because they arose from core governmental conduct, the exercise of a sovereign's police power within its own borders. The Eleventh Circuit reasoned that "when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity, then the claim is 'based upon' commercial activity." *Id.* at 1534, App. at 12a. The court then held that the arrest and imprisonment of Respondent — the acts for which damages are sought — amounted to commercial activity because that conduct "resulted from and [was] directly attributable to [Respondent's] employment." *Id.* at 1535, App. at 16a. The court supported this conclusion by noting that either Respondent was arrested for performing his duties as monitoring systems engineer as he alleges, or else he was arrested for submitting a false diploma as Petitioners allege. *Id.* at 1535-36, App. at 16a.

The Eleventh Circuit also found that the connection between the gravamen of Respondents' complaint — allegations of wrongful arrest and imprisonment — and Petitioners' commercial activity in the United States was sufficient to justify the assertion of jurisdiction under the commercial activity exception. The court found that the recruitment and hiring of Respondent constituted the necessary commercial activity in the United States because it "was part of a process having 'substantial contact with the United States.'" *Id.* at 1533, App. at 11a. The court then held that "the detention and torture of [Respondent] are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States." *Id.* at 1535, App. at 15a.

Having found a sufficient connection to justify the assertion of jurisdiction in the United States over Petitioners Saudi Arabia and the Hospital, the court turned to the allegations against Petitioner Royspec. It noted that Royspec "maintains an office in Maryland, and acts as the purchasing agent for the Hospital, in the United States." *Id.* at 1536, App. at 17a. It then found the necessary connection between that commercial activity in the United States and the claims in Respondent's receipt of the phone number of Royspec's Maryland office as an emergency number for his family. *Id.* The court, therefore, held that "Royspec is within the subject matter jurisdiction of the court." *Id.*

After the Eleventh Circuit entered judgment, Petitioners sought rehearing and suggested rehearing en banc. The United States filed a statement of interest in support of the petition for rehearing.[7] The petition was denied.[8]

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision in this case marks the first time that any United States court has asserted jurisdiction over a foreign state on the basis of a tort allegedly committed in the exercise of the foreign sovereign's police power wholly within its own territory. This ruling is not only unprecedented, it is wrong. The Eleventh Circuit's expansion of the jurisdiction of the United States courts in this case conflicts with the decisions of other circuits, misinterprets the FSIA, and defeats

[7]The position of the United States is fully set forth in its Statement of Interest included in the Appendix hereto at 29a. In light of the United States' expressed interest in this case, it may be appropriate to solicit a response from the Solicitor General.

[8]The Eleventh Circuit's decision "does not purport to address the applicability of the act of state doctrine." Order Denying Petition for Rehearing and Suggestion of Rehearing En Banc, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991); App. at 27a.

congressional intent. Not only does the Eleventh Circuit's decision deprive Petitioners of the immunity that Congress intended, it also interjects United States courts into the arena of foreign affairs, potentially impeding the ability of the executive branch to conduct foreign relations. As the United States stated in its statement of interest in support of the petition for rehearing and suggestion of rehearing en banc, the Eleventh Circuit's decision "radically departs from established law and is at odds with Congress' intent." Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing In Banc at 9, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), App. at 42a [hereinafter Statement of Interest].

This Court should grant the petition for two reasons. First, the decision of the Eleventh Circuit conflicts with decisions of several other United States Courts of Appeals that have interpreted the FSIA. This conflict, unless resolved by this Court, will result in inconsistent treatment of foreign sovereigns before the courts of the United States.

Second, this Court has not yet addressed the significant questions of federal law involved in this case. The FSIA is an important federal statute, implicating not only the jurisdiction of United States courts, but the conduct of foreign relations as well. The issues presented in this case have "major foreign policy ramifications" for the United States because the FSIA "is the only means by which foreign states may be sued in United States courts." Statement of Interest at 1, 2, App. at 36a. Because the Eleventh Circuit's ruling in this case conflicts with the decisions of other circuits and because the Eleventh Circuit wrongly decided important federal questions, this Court should grant the petition.

I. THE DECISION OF THE ELEVENTH CIRCUIT SQUARELY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

United States Courts of Appeals have interpreted the commercial activity exception of the FSIA to establish two fundamental prerequisites to the exercise of subject-matter jurisdiction over disputes involving a foreign state. First, the conduct of the foreign state forming the basis of the complaint must be commercial in nature; a court cannot adjudicate claims arising from sovereign conduct, regardless of their relationship to commercial activity. Second, when a claim arises from the commercial conduct of a foreign state outside the United States, that conduct must be sufficiently related to the commercial activity of the foreign state in the United States to justify haling the foreign state into a United States court. The Eleventh Circuit's holding in this case conflicts with the decisions of other circuits on both critical points.

In this case, the Eleventh Circuit held for the first time that the FSIA requires a foreign state to submit to the jurisdiction of a United States court over claims arising from purely sovereign conduct — the arrest and imprisonment by Saudi law enforcement officials of a foreign resident alien — if that conduct can be even remotely connected to commercial activity. The Eleventh Circuit also held that the FSIA permits the exercise of jurisdiction over claims arising from the conduct of a foreign state outside the United States, even if those claims have no legally relevant relationship to the foreign state's conduct in the United States; as, for example, in this case where the recruitment of Respondent in the United States is legally irrelevant to his claims of wrongful arrest and imprisonment in Saudi Arabia. Because these holdings establish jurisdictional standards directly in conflict with the standards established by other circuits, this Court should grant certiorari to resolve the dispute.

A. The Eleventh Circuit's Holding That the Exercise of the Police Power in a Foreign State Can Be Considered Commercial Activity For Purposes of the FSIA Directly Conflicts With Decisions of the Second, Fifth, Ninth, and District of Columbia Circuits

The Eleventh Circuit held that the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1988), abrogates the immunity of a foreign state from claims arising out of core sovereign conduct, such as law enforcement activities, when that conduct has a "jurisdictional nexus" with the foreign sovereign's commercial conduct. The court held, "[A] claim is 'based upon' the commercial activity of a foreign state when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity." *Nelson*, 923 F.2d at 1534, App. at 12a. This holding marks an unprecedented expansion of the jurisdiction of the federal courts. It also conflicts directly with the holdings of four other circuits.

The Ninth Circuit held in *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 237 (1989), that the commercial activity exception does not confer jurisdiction over claims arising from the sovereign conduct of a foreign state, even when that conduct is allegedly tied to commercial activity. In *Gregorian*, an American businessman alleged that *Izvestia*, an official publication of the Soviet Union, had libelled him as part of a civil conspiracy with other Soviet government defendants to avoid contractual obligations to the plaintiff's company. *Id.* at 1517. The plaintiff contended that the commercial activity exception conferred jurisdiction over the libel claim against *Izvestia* because *Izvestia* had published the allegedly libelous article " 'in connection with' a 'commercial activity' of the [other] Soviet defendants." *Id.* at 1521 (quoting Gregorian's complaint).

In rejecting the plaintiff's contention, the Ninth Circuit emphasized that the FSIA characterizes governmental activities by their nature, not their purpose. *Id.* (citing 28 U.S.C. § 1603(d) (1988)). Because *Izvestia*'s publication of the article was "clearly governmental" in nature, *id.*, the Ninth Circuit held that the district court had properly dismissed the libel claim for lack of subject-matter jurisdiction despite its connection to Soviet commercial activity in the United States. *Id.* at 1522. The Eleventh Circuit, by contrast, held that it could assert jurisdiction over Respondent's claims of wrongful arrest and imprisonment, despite the clearly governmental nature of Petitioners' exercise of its police power, because that conduct allegedly had the commercial purpose of punishing Respondent for employment-related acts. *Nelson*, 923 F.2d at 1535-36, App. at 16a.[9]

[9]While styled as claims for "wrongful arrest and imprisonment" and "inhuman torture", Respondents' causes of action are clearly predicated upon an alleged abuse of legal process and could have been styled as "malicious prosecution" or "abuse of process." *See Mundt v. United States*, 611 F.2d 1257, 1259 (9th Cir. 1980) ("[i]f the imprisonment is under legal process but the action has been carried on maliciously and without probable cause, it is malicious prosecution"); *Nesmith v. Alford*, 318 F.2d 110, 118 n.4 (5th Cir. 1963) ("[m]alicious prosecution is the groundless institution of criminal proceedings"), *cert. denied*, 375 U.S. 975 (1964). *See also McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 (D.C. Cir. 1984) (misuse of legal process is the essence of the tort of abuse of process). Petitioners, therefore, argued on appeal that they were immune from Respondents' claims under 28 U.S.C. § 1605(a)(5)(B), which immunizes foreign states from claims of malicious prosecution or abuse of process. Although the Eleventh Circuit did not address this argument in its opinion, its decision in this case implicitly rejects the Ninth Circuit's holding in *Gregorian*, 871 F.2d at 1522 n.4, that Congress intended § 1605(a)(5)(B) to grant foreign states complete immunity from claims "arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" regardless of any connection between the conduct forming the basis of those claims and the foreign state's commercial activity.

The D.C. Circuit has also expressly rejected the interpretation of the FSIA which the Eleventh Circuit adopted in this case. In *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879 (D.C. Cir. 1988), Millen alleged that an instrumentality of Taiwan induced it to construct and operate a factory in Taiwan by promising it duty-free treatment for its imports and " 'easy access through Taiwanese customs'." *Id.* at 880-81 (quoting Millen's complaint). After Taiwan cancelled duty-free treatment and otherwise obstructed Millen's operations, Millen sued the Taiwanese instrumentality, alleging breach of contract, misrepresentation and conversion. *Id.*

The D.C. Circuit held that the commercial activity exception did not confer jurisdiction over Millen's claims of misrepresentation based on changes in Taiwan's customs law. Though involving the commercial element of investment promotion, those claims arose from sovereign conduct — namely, the right to regulate international trade. *Id.* at 885. The court reasoned:

> [W]hen a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on. Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity.

Id. The court also held that the commercial activity exception would confer jurisdiction over Millen's claim based on the defendant's representation of "easy access through Taiwanese customs" if Millen could demonstrate that this representation referred to "the commercial activity of a commercial 'customs expediter'" as opposed to "the essentially governmental activities of customs agents." *Id.* In opposition to the D.C. Circuit, the Eleventh Circuit held in *Nelson* that when

a cause of action partakes of both commercial and sovereign elements, jurisdiction will obtain as long as a jurisdictional nexus exists between the foreign state's sovereign conduct and its commercial activity. *Nelson*, 923 F.2d at 1534, App. at 12a.

The Fifth Circuit, in *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), has also dismissed the contention that the sovereign activity of a foreign state may be subjected to scrutiny in federal court by virtue of its connection with commercial activity. The *De Sanchez* court rejected the notion that the commercial activity exception conferred jurisdiction over plaintiff's claims against the central bank of Nicaragua for its failure to honor its own check. The central bank had issued the check, payable in United States dollars, as part of a sale of dollars to a private Nicaraguan bank which had insufficient foreign exchange to honor the plaintiff's demand on a certificate of deposit purchased from that bank. *Id.* at 1387-88.

In dismissing the claim for lack of subject-matter jurisdiction, the Fifth Circuit held that the central bank's issuance of the check was sovereign in nature and "imbued its later breach with sovereignty" because the central bank had issued the check as part of "its official role of regulating the sale of foreign exchange." *Id.* at 1393, 1394. In reaching this result, the court ignored the connection between the issuance of the check and the commercial activity of selling the certificate of deposit as well as the generally commercial character of sales of foreign currency. *Id.* at 1391-92. The Eleventh Circuit, by contrast, relied on the alleged connection between Petitioners' arrest and imprisonment of Respondent and his employment at the Hospital to justify the exercise of jurisdiction under the FSIA. *Nelson*, 923 F.2d at 1535, App. at 16a.

In *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985), the Second Circuit reversed

a district court ruling that would have permitted execution to satisfy a tort judgment against LAN, Chile's national airlines, under a provision of the FSIA paralleling the commercial activity exception for subject-matter jurisdiction,[10] " 'so long as the assets on which the judgment creditor seeks to execute were also used commercially in the activity giving rise to the claim.' " *Id.* at 792 (quoting *Letelier v. Republic of Chile*, 567 F.Supp. 1490, 1499 (S.D.N.Y. 1983)). The plaintiffs in *Letelier* contended that they could execute a judgment against LAN because of its alleged complicity, through its commercial activity, in the assassination of plaintiffs' decedents. Rejecting this argument, the Second Circuit held that state-sponsored terrorism is sovereign conduct that does not fall within the commercial activity exception, regardless of its connection to commercial activity. 748 F.2d at 797-98. Thus, whereas the Second Circuit refused to apply the commercial activity exception to claims arising from state-sponsored terrorism, despite their connection to commercial activity, the Eleventh Circuit held that the FSIA confers jurisdiction over allegations of torture — defined in Respondents' complaint as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official" — because of their alleged connection to commercial activity.

In sum, the Eleventh Circuit stands alone in interpreting the FSIA to confer subject-matter jurisdiction over claims arising from the sovereign conduct of a foreign state when that conduct is connected with the foreign sovereign's commercial activity. Four circuits have held that in such circumstances, the complaint must be dismissed for lack of subject-matter jurisdiction. Only this Court can resolve this irreconcilable conflict among the circuits.

[10] "Congress specifically designed the execution immunity rules to 'conform' to the jurisdictional immunity provisions of § 1605." *Letelier*, 748 F.2d at 796 (citing House Report, *supra* note 1, at 7).

B. The Eleventh Circuit's Holding That Respondents' Claims Have Substantial Contact With the United States Directly Conflicts With the Decisions of Other Circuits

The commercial activity exception requires that an action be "based upon" the commercial activity of the foreign state in the United States. In this case, Respondent alleges that he was arrested and imprisoned because of his job performance. He performed his job entirely in Saudi Arabia. Nevertheless, the Eleventh Circuit found that the recruitment and hiring of Respondent in the United States — consisting only of HCA's advertisement for the position at the Hospital and Respondent's receiving the offer and executing the employment contract — constituted commercial activity in the United States within the meaning of the FSIA because it "was part of a process having 'substantial contact with the United States'." *Nelson*, 923 F.2d at 1533, App. at 11a. The court followed a two-step analysis to find that Respondent's claims were based upon commercial activity carried out in the United States: first, the gravamen of Respondent's complaint — the alleged wrongful arrest and torture by Saudi law enforcement officials — was "intertwined with his employment at the Hospital", *Id.* at 1535; second, the employment resulted from his recruitment and hiring in the United States. *Id.* Thus, by jumping through two hoops, the Eleventh Circuit has found jurisdiction in a case where the contact with the United States is not only attenuated, but legally irrelevant.

Under the Eleventh Circuit's apparent "double nexus" test, the link between a foreign sovereign's commercial activity in the United States and its activity outside the United States forming the basis of the complaint satisfies the substantial contact requirement even though the commercial activity in the United States was not part of the activity forming the gravamen of the complaint nor an element of the alleged causes

of action. The Eleventh Circuit's holding directly conflicts with the majority of circuits — the Second, Third, Fifth, Sixth and Ninth — that have adopted the "nexus test." It also conflicts with the minority of circuits — the Seventh and D.C. Circuits — that have adopted the "*Gilson* test."

Five circuits have adopted a "nexus test" to determine whether the link between the conduct of the foreign state forming the basis of the complaint and the foreign state's commercial activity in the United States satisfies the requirement that the commercial activity be "carried on in the United States." These circuits have stated the test variously as follows:

> (1) "[T]he first clause of § 1605(a)(2) . . . withdraws immunity with respect to . . . acts outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' . . . 'having substantial contact with the United States.' " *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir.), *cert. denied*, 484 U.S. 964 (1987) (quoting *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983).
>
> (2) Plaintiff's claim is "based upon" a commercial activity carried on in the United States where there is "a nexus between [plaintiff's] grievance and [defendant's] 'commercial activity carried on in the United States.' " *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3rd Cir. 1980) (quoting 28 U.S.C. § 1605(a)(2)).
>
> (3) "[T]he commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based." *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991).

> (4) "[T]he commercial activity [in the United States] relied upon by plaintiff for jurisdictional purposes must be also the activity upon which the lawsuit is based; that is, there must be a connection between that activity, and the act complained of in the lawsuit." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988).
>
> (5) "There must be a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance. The commercial activity relied upon by [plaintiff] to establish jurisdiction must be the activity upon which the lawsuit is based." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989) (citations omitted).

Each of these circuits, therefore, holds that a claim arising from a foreign sovereign's commercial activity outside the United States is "based upon" the foreign sovereign's commercial conduct within the United States only if the foreign sovereign's commercial activity within the United States is also the same activity on which the claim is based.

In the seminal "nexus test" case, *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980), the plaintiff alleged that Aeromexico, Mexico's national airline, had breached the common carrier's duty of care by delaying his return flight to the United States under intolerable conditions. The district court dismissed for lack of subject-matter jurisdiction. *Id.* at 272. Reversing, the Third Circuit found that the plaintiff's purchase of his roundtrip ticket in the United States and the occurrence of the alleged tort at the midpoint of that roundtrip supplied the required nexus to establish that the complaint was "based upon" Aeromexico's airline operations in the United States. *Id.*

While *Sugarman* exemplifies the quantum and type of contacts that will provide the required nexus, *America West*

Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989), typifies the cases where the contacts between the foreign sovereign's commercial activity in the United States and the acts forming the basis of the complaint do not satisfy the nexus requirement. America West purchased an airplane whose engines had been overhauled by Airmotive, a wholly owned subsidiary of Ireland's national airlines, Aer Lingus. After the engine failed, caught fire, and was destroyed, America West sued Airmotive and Aerlinte, another wholly owned subsidiary of Aer Lingus, for negligence. *Id.* at 795. Although finding that Aerlinte's operation of a commercial airline constituted commercial activity in the United States by a foreign state, the Ninth Circuit held that this commercial activity did not confer subject-matter jurisdiction because America West's "claim [did] not in any way relate to *Aerlinte*'s commercial operations. The '*specific* acts that form the basis of the suit,' [were] the engine maintenance activities of Airmotive, which took place solely in Ireland." *Id.* at 797. (emphasis in original, footnote and citation omitted).

The Eleventh Circuit's "double nexus" test establishes a different legal threshold, allowing jurisdiction over claims that have a much looser connection with the United States than the connection required under the nexus test. The result in this case, therefore, would have been different had Respondent filed the complaint in one of the five circuits applying the nexus test. In any of those circuits, Respondent's claims would have been dismissed for lack of subject-matter jurisdiction.

The "*Gilson* test", first introduced in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), requires a tighter fit between the commercial activity of a foreign state in the United States and the commercial activity forming the gravamen of the complaint than even the nexus test. The *Gilson* court explained that an action meets the "based upon" requirement of the commercial activity exception if the plain-

tiff can demonstrate "a direct causal connection" between the commercial activity in the United States and the acts forming the basis of the complaint or if the commercial activity in the United States "is an element of the cause of action under whatever law governs [the] claims." *Id.* at 1027 n.22. Although the *Gilson* case involved clause two of the commercial activity exception, the D.C. Circuit has also applied this standard in a case involving clause one. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988).

Zedan involved a breach-of-contract claim against the Kingdom of Saudi Arabia. Zedan had received a telephone call in the United States recruiting him for work on a road construction project in Saudi Arabia. After Zedan had been on the job for five months, a new employer took over the project and signed Zedan to a five-year employment contract. When an agency of the Saudi government subsequently took over the project, it guaranteed payment under Zedan's employment contract. Zedan alleged that Saudi Arabia never paid the guaranteed salary. *Id.* at 1512. The D.C. Circuit rejected Zedan's contention that the recruitment call to the United States supplied the necessary link between the United States and the alleged breach of contract in Saudi Arabia. It reasoned that the link between the call and the guarantee was "too attenuated to constitute 'a direct causal connection.' " *Id.* at 1514. The court added,

> Under appellant's theory, our jurisdiction would extend to any and all disputes between Zedan and Saudi Arabia subsequent to the phone call, merely because but for that call Zedan would not have traveled to Saudi Arabia.

Id. As in *Zedan*, the link between Respondent's recruitment and hiring in the United States and his arrest and imprisonment in Saudi Arabia is "too attenuated to constitute 'a direct causal

connection,'" for otherwise "jurisdiction would extend to any and all disputes between [Respondent] and Saudi Arabia subsequent to" Respondent's recruitment. *Zedan*, 849 F.2d at 1514.

The Seventh Circuit recently applied the alternative prong of the "*Gilson* test" in *Santos v. Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991).[11] There, the plaintiff, an employee of an American company, sued Air France for personal injuries resulting from the negligence of an Air France employee at a French airport. The plaintiff claimed that his cause of action was "based upon" Air France's commercial activity in the United States because he was working at the airport under a lease between Air France and his employer. *Id.* at 892. The Seventh Circuit rejected this argument, reasoning that the plaintiff did not claim any rights as a third-party beneficiary to the lease. *Id.* It then held that the plaintiff could not satisfy the "based upon" requirement of the commercial activity exception because "[n]one of the elements of [his] claim concern acts in the United States." *Id.* at 894.

Applying either prong of the *Gilson* test to the facts in this case would require dismissal of Respondents' complaint for lack of subject-matter jurisdiction. The Eleventh Circuit did not find "direct" causation. Indeed, even Respondent alleges only indirect causation. In essence, Respondent alleges that he was recruited in the United States to perform a job in Saudi Arabia. He then alleges that he was unlawfully arrested on the basis of his job performance in Saudi Arabia. Under

[11]The *Santos* court, citing the Eleventh Circuit's decision in *Nelson*, noted that the term "'based upon' requires an 'identifiable nexus' between the claim and the commercial activity at issue." *Santos*, 934 F.2d at 982. It then turned to the remaining question, "what level of 'nexus', 'bond', 'link', or 'connection', is necessary", and concluded "that a claim is 'based upon' events in the United States if those events establish a legal element of the claim." *Id.* at 893.

Respondent's own allegations, then, the job performance — not his recruitment — is the direct cause of his alleged injury. In finding sufficient contact with the United States, the Eleventh Circuit embraced a "but for" causation analysis: a jurisdictional test which, taken to its logical extreme, is virtually limitless.

Respondent also could not satisfy the alternative prong of the *Gilson* test. The Eleventh Circuit did not find — as it could not — that any element of Respondent's cause of action occurred in the United States. The incidental contact that Petitioners' recruitment and hiring of Respondent had with the United States is not an element of his claims for wrongful arrest and imprisonment. The Eleventh Circuit, therefore, has established a standard for the exercise of jurisdiction over foreign states that is far broader than, and squarely conflicts with, the governing standard in the Seventh and District of Columbia Circuits.

In sum, the Eleventh Circuit's decision in this case creates standards for the exercise of jurisdiction over foreign states in direct conflict with the standards applied in other circuits. Claims that would be dismissed in other circuits for lack of subject-matter jurisdiction can proceed in the Eleventh Circuit. If the decision in this case stands, any claim — even if based upon the inherently sovereign conduct of a foreign state — can be adjudicated in the Eleventh Circuit if the plaintiff merely alleges a connection to the foreign state's commercial activity. Thus, the Eleventh Circuit's decision permits jurisdiction over claims against a foreign state far more tenuously linked to the foreign state's commercial activity in the United States than the connection required in seven other circuits. As the United States asserted in its Statement of Interest, the opinion of the Eleventh Circuit is "inconsistent with many other circuit decisions which make clear that the commercial activity providing the jurisdictional nexus with the United States

must itself be the activity on which the lawsuit is based." Statement of Interest at 4, App. at 38a. Because these conflicting standards cannot be reconciled, this Court should grant certiorari to resolve the dispute.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH THIS COURT SHOULD RESOLVE

In the nearly fifteen years since the enactment of the FSIA, this Court has not addressed the proper interpretation of the commercial activity exception to foreign sovereign immunity, despite its status as the most frequently litigated FSIA exception. *See De Sanchez*, 770 F.2d at 1390. Apart from the need to resolve the conflict among the circuits, this Court should resolve the issues presented in this case for two additional reasons: first, the potential for inconsistent treatment of foreign sovereigns created by the Eleventh Circuit's decision defeats Congress's primary purpose in enacting the FSIA; second, the Eleventh Circuit's decision interferes with the conduct of foreign relations and has major foreign policy implications for the United States and all foreign states.

A. The Eleventh Circuit's Decision Defeats Congress's Intent in Enacting the FSIA

Congress had two principal purposes in enacting the FSIA: first, to codify the "restrictive" principle of sovereign immunity; second, to eliminate the prevailing inconsistency in sovereign immunity decisions resulting from the State Department's role in the decision-making process. The Eleventh Circuit's ruling and the resultant conflict among the circuits undermine both purposes.

Congress's paramount purpose in enacting the FSIA was to ensure that United States courts do not assert jurisdiction

over the sovereign acts of a foreign state. Congress achieved this end by codifying the "restrictive" principle of immunity in the FSIA. That principle restricts foreign sovereign immunity "to suits involving a foreign state's public acts." House Report, *supra* note 1, at 7. As a result, "[t]he determination of whether particular behavior is 'commercial' [or sovereign] is perhaps the most important decision a court faces." *Letelier*, 748 F.2d at 797.

The Eleventh Circuit's holding that Petitioners are required to defend in United States courts against allegations arising from the exercise of the sovereign police power contravenes Congress's primary purpose in enacting the FSIA by extending the jurisdiction of the federal courts to claims arising from the sovereign acts of a foreign state. As this Court has said, "If there is a present need to expand the jurisdiction of [the federal] courts . . . the Constitution specifically vests that power in the Congress, not in the courts." *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969). The Eleventh Circuit's unilateral expansion of jurisdiction of United States courts is not only contrary to law, but of sufficient import to merit this Court's review.

Congress also enacted the FSIA to ensure that claims of foreign sovereign immunity are uniformly decided. Before the enactment of the FSIA, sovereign immunity determinations were made under "standards [that] were neither clear nor uniformly applied." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Congress intended to solve these problems by "transfer[ring] the determination of sovereign immunity from the executive branch to the judicial branch." House Report, *supra* note 1, at 7.

Contrary to Congress's intent, the Eleventh Circuit's decision will result in renewed inconsistency in determinations of

foreign sovereign immunity. These conflicting standards, at the least, confuse a foreign state subject to jurisdiction in one circuit, but not in another, for claims arising from similar conduct. Furthermore, by allowing a conflict among the circuits to persist, this Court would paradoxically permit FSIA decisions to revert to the pattern of inconsistency which Congress charged the judiciary to rectify.

Finally, this Court should grant review to establish clear standards that will guide the courts of the United States through a statutory framework that has alternatively been described as "labyrinthine", "remarkably obtuse", "twisted", and "a constant bane of the federal judiciary". *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 382 (5th Cir. 1991); *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., dissenting); *Gibbons v. Udaras na Gaeltachta*, 549 F.Supp. 1094, 1105, 1106 (S.D.N.Y. 1982). Indeed, permitting various interpretations of the FSIA to cohabitate among the circuits will only exacerbate the difficulties that the lower federal courts already face in applying the FSIA. This case, therefore, represents an appropriate opportunity for the Court to clarify the application of the commercial activity exception to foreign sovereign immunity.

B. This Case Implicates Important Foreign Relations Issues That Concern the United States and All Foreign States

The United States signified the importance of the issues in this case by filing a statement of interest in support of Petitioner's request for rehearing and suggestion for rehearing en banc. As the United States stated in its brief, this case involves "an important federal statute with major foreign policy ramifications." Statement of Interest at 1, App. at 35a. The

United States, of course, does not conduct foreign relations in a vacuum. The proper resolution of this case concerns the United States and all foreign sovereigns for two reasons.

First, as the United States said, if the police activities of foreign states can be scrutinized in United States courts, then the law enforcement conduct of the United States can be challenged in foreign tribunals, requiring American law enforcement officials to defend their conduct before foreign courts. *Id.* at 2, App. at 36a. Second, the United States could not claim immunity for its own law enforcement officials in foreign tribunals because, when sued in a foreign nation, the United States determines whether to raise the immunity defense based on the standards established under the FSIA.[12] *Id.* at 2-3 App. at 36a.

Although the United States addressed only law enforcement activity in its statement of interest, the Eleventh Circuit's holding is not so limited. It will touch on the full range of sovereign activity which may be the subject of litigation. As this Court said in ***Ex Parte Republic of Peru***, 318 U.S. 578, 588 (1943), "[C]ourts may not so exercise their jurisdiction . . . as to embarrass the executive arm of the government in conducting foreign relations." If not reversed, the Eleventh Circuit's decision in this case raises precisely that risk.

[12]Such suits against the United States do not pose a merely hypothetical concern. Indeed, claims similar to Respondents' have been filed against the United States in Unites States courts. In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), for example, plaintiffs brought an action against United States officials allegedly involved in "summary execution, murder, abduction, torture" and other violations of "international law" in Nicaragua. Holding that the United States had not waived its sovereign immunity for such claims, the court dismissed the claims on the ground of sovereign immunity. *Id.* at 207.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Scott NELSON and Vivian Nelson, Individually and as Husband/Wife, Plaintiffs-Appellants,

v.

SAUDI ARABIA, King Faisal Specialist Hospital, Royspec, Defendants-Appellees.

No. 89-5981.

United States Court of Appeals,
Eleventh Circuit.

Feb. 21, 1991.

Jorge A. Duarte, P.A., Miami, Fla. and Anthony D'Amato, Northwestern University School of Law, Chicago, Ill, for plaintiffs-appellants.

Maureen E. Mahoney, Latham & Watkins, Washington, D.C., for Saudi Arabia.

Marc Cooper, Cooper, Wolfe & Bolotin, P.A., Miami, Fla., for King Faisal Hosp. and Saudi Arabia.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON and BIRCH, Circuit Judges, and RE*, Chief Judge.

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*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

RE, Chief Judge:

Plaintiffs-appellants, Scott and Vivian Nelson, appeal from a judgment of the United States District Court for the Southern District of Florida, dismissing their claim against defendants-appellees, Saudi Arabia, King Faisal Specialist Hospital, and Royspec, for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976.

Scott Nelson was hired, in the United States, as a monitoring systems engineer for the King Faisal Specialist Hospital (the Hospital) in Riyadh, Saudi Arabia. Nelson alleged that, in the course of performing his duties under his employment contract with the Hospital, he was detained and tortured by agents of the Saudi government in Saudi Arabia in retaliation for reporting safety violations at the Hospital.

Nelson brought suit for his injuries against Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the government of Saudi Arabia (collectively Saudi Arabia). Nelson alleged subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (the FSIA). The district court concluded that Nelson's claims were not based upon the commercial activities of Saudi Arabia carried on in the United States, as required by the FSIA, and granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction.

On appeal, Nelson contends that the district court erred in granting Saudi Arabia's motion to dismiss. Nelson asserts that, since his detention and torture were based upon his recruitment and hiring in the United States by an agent of the Saudi government, the district court has subject matter jurisdiction under the FSIA.

The question presented is whether the district court erred in determining that it does not have subject matter jurisdiction under the FSIA. More specifically, did the court have

jurisdiction in this action for damages for the detention and torture of Nelson by agents of the Saudi government, in Saudi Arabia, in retaliation for Nelson's conduct during his employment in Saudi Arabia in a position for which he was recruited and hired in the United States by an agent of the Saudi government.

Since we conclude that Nelson's detention and torture were based upon the recruitment and hiring of Nelson in the United States by an agent of the Saudi government, and that the recruitment and hiring was a commercial activity of Saudi Arabia, we hold that the district court has subject matter jurisdiction under the FSIA. Accordingly, we reverse the judgment of the district court.

BACKGROUND

In 1983, Scott Nelson, while in the United States, saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital (the Hospital), in Riyadh, Saudi Arabia. The recruitment was conducted by the Hospital Corporation of America (HCA), an independent corporation which, in 1973, had contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the hospital.

After submitting an application, Nelson was interviewed in Saudi Arabia by two officials of the Hospital. Subsequently, he returned to the United States, and entered into a contract of employment with the Hospital as a monitoring systems engineer. The contract was signed in Miami, Florida, in November, 1983.

Nelson commenced employment at the Hospital on December 7, 1983. As stated in the Hospital's job description for monitoring systems engineer, Nelson was "[r]esponsible for the development and expansion of electronic monitor-

ing and control systems capabilities." He was also responsible for recommending "modifications of existing equipment and the purchase and installation of new equipment."

Nelson alleges that, on March 20, 1984, in the course of his duties at the Hospital, he discovered certain safety hazards, and reported these safety hazards to an investigative commission of the Saudi government. Nelson states that, on September 27, 1984, he was summoned to the Hospital's security office by agents or employees of the Hospital. He alleges that, from the security office, he was moved to a jail cell where he was "shackled, tortured and beaten" by agents or employees of the Saudi government. Nelson states that he was imprisoned for 39 days, during which time he was never informed of any charges against him, nor was he ever accused of a crime. He further states that his wife was told by a Saudi government official that he could be released if she provided sexual favors.

Nelson and his wife, Vivian Nelson, sued Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the Saudi government which acts as a purchasing agent for the Hospital. Nelson sought compensatory and punitive damages under 16 counts, and asserted that the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1602-1611. Saudi Arabia moved for dismissal for lack of subject matter jurisdiction.

The district court concluded that "the link between the recruitment activities and the Defendants is not sufficient to establish 'substantial contact' with the United States," within the meaning of 28 U.S.C. § 1603(e). *Nelson v. Saudi Arabia*, No. 88-1791, slip op. at 5 (S.D.Fla. Aug. 11, 1989). The district court also noted that "even if the court had determined that [the Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United

States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint." *Id.* at 8. Accordingly, the district court granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction, thereby dismissing the action against all defendants.

DISCUSSISON

In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812), the Supreme Court adopted the common law doctrine of foreign sovereign immunity. As noted in *The Schooner Exchange*, the doctrine of foreign sovereign immunity rests on principles of comity between nations. *See id.* 135-36. *See also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983).

On the question of foreign sovereign immunity, the Supreme Court has generally deferred to the decisions or recommendations of the Executive Branch of government. *See id.; Ex Parte Republic of Peru*, 318 U.S. 578, 586-90, 63 S.Ct. 793, 799-800, 87 L.Ed. 1014 (1943) (discussing reasons for deferring to Executive Branch). Consequently, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967.

The doctrine of foreign sovereign immunity is closely related to the act of state doctrine. As articulated in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897), under the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the

> acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252, 18 S.Ct. at 84. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n. 7, 96 S.Ct. 1854, 1859 n. 7, 48 L.Ed.2d 301 (1976).

Neither the doctrine of foreign sovereign immunity nor the act of state doctrine are as widely applied now as in the past. Indeed, it was suggested years ago that the act of state doctrine had "earned a well-deserved rest." E. Re, *Foreign Confiscations in Anglo-American Law* 170 (1951). *See also* Cardozo, *International Law in the New York Courts—1953*, 40 Cornell L.Q. 97, 109 (1955) ("the urge to grant sovereign immunity has also lost much of its force"). Surely, "the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.' " *Alfred Dunhill*, 425 U.S. at 705, 96 S.Ct. at 1866.

The present restrictive attitude in the application of the act of state doctrine is reflected in Justice Scalia's opinion in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, ____ U.S. ____, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). In *Kirkpatrick* the plaintiff, an American corporation that unsuccessfully bid on a public works contract in Nigeria, sued the defendant, an American corporation that was the successful bidder on the contract. The plaintiff brought suit for damages, and contended that the defendant, which had pled guilty to violations of the Foreign Corrupt Practices Act of 1977, had paid bribes to Nigerian officials in order to obtain the contract. *See id.* 110 S.Ct. at 702-03. The defendant moved to dismiss,

contending that the suit was barred by the act of state doctrine. The district court granted the motion to dismiss. The Court of Appeals for the Third Circuit, however, reversed, and the Supreme court granted the defendant's writ of certiorari. *See id.* at 703-04.

In *Kirkpatrick*, the Supreme Court noted that, in prior opinions, several Justices had suggested an exception to the act of state doctrine for commercial transactions. *See id.* at 704 (citing *Alfred Dunhill*, 425 U.S. at 695-706, 96 S.Ct. at 1861-1867 (opinion of White, J.)). The Court stated that, apart from any exceptions, the act of state doctrine does not apply in *Kirkpatrick*, since "[n]othing in the present suit requires the court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country', the official act of a foreign sovereign." *Id.* (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 314, 62 L.Ed. 733 (1918)).

The present application of the doctrine of foreign sovereign immunity was significantly influenced by the shift or change in United States policy announced in the May 19, 1952 letter from the Acting Legal Adviser of the Department of State to the Acting Attorney General. After referring to the classical or "absolute" theory of sovereign immunity, the letter stated that " 'it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.' " 26 Dep't St.Bull. 984, 985 (1952) (quoting Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952)).

The restrictive theory of sovereign immunity which was embraced by the 1952 policy grants immunity to a foreign sovereign only for acts characterized as "public" and not as

to those deemed "private." According to the modern theory, a state may be held liable in the courts of another nation if "it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act." Article 11, Draft Convention on Competence of Courts in Regard to Foreign States, *quoted in* Re, *Judicial Developments in Sovereign Immunity and Foreign Confiscations*, 1 N.Y.L.Forum 160, 167 (1955).

In the Restatement, it is stated that under the act of state doctrine the courts of the United States "will generally refrain from . . . sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Restatement (Third) of Foreign Relations § 443(1) (1987). It has been noted, however, that the effect of the Restatement "has been to present the act of state doctrine as broader in scope, more general in application, more preclusive of international law, and less susceptible of limitation than is warranted by governing authority." Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 Int'l Law. 1, 13-14 (1990). *See also* Olmstead, *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States—Jurisdiction*, 14 Yale J. Int'l L. 468, 481-82 (1989).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (the FSIA). *See* 28 U.S.C. §§ 1602-1611 (1988). As noted by Professor Hans Smit, the FSIA represented "an attempt at comprehensive statutory regulation of jurisdictional immunities of foreign states and their agencies and instrumentalities." Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea For Drastic Surgery*, *reprinted in* American Society of

International Law, Proceedings of the 74th Annual Meeting 49, 49 (1980).

According to the Report of the Judiciary Commitee of the House of Representatives, the FSIA was enacted "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6604. The House Report also notes that the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial or private acts. *See id.* at 7, 1976 U.S.Code Cong. & Admin.News at 6605.

The FSIA provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. § 1605(a)(2) (1988). Under the FSIA, a "commercial activity carried on in the United States by a foreign state" is defined as a "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e) (1988).

In this case, Nelson contends that the district court has sub-

ject matter jurisdiction under the first clause of section 1605(a)(2), since "the action is based upon a commercial activity carried on in the United States by the foreign state. . . ." More specifically, Nelson states that "[t]he arbitrary prolonged detention and the physical torture of Mr. Nelson . . . is based directly upon the recruitment activity carried on in the United States by agents of Saudi Arabia."

In order to conclude that there is subject matter jurisdiction under the first clause of section 1605(a)(2), the court must find that Saudi Arabia's recruitment and hiring of Nelson, in the United States, was a "commercial activity," within the meaning of the FSIA. The FSIA provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1988). *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir.1985).

Citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C.Cir.1988), Saudi Arabia asserts that the mere recruitment of an employee in the United States is an insufficient contact on which to base subject matter jurisdiction under the FSIA. In *Zedan*, the plaintifff, while in the United States, received a phone call recruiting him to work on a project in Saudi Arabia for a company which was not an agency of the Saudi government. *See id.* at 1512. After the plaintiff had worked on the project for two different companies for approximately three years, the project was taken over by an agency of the Saudi government. Several months later, after completing his employment but without receiving total payment, the plaintiff returned to the United States. The plaintiff then sued Saudi Arabia, seeking money due him under his contract of employment. The district court granted Saudi Arabia's motion to dismiss. *See id.*

On appeal, the Court of Appeals for the District of Columbia Circuit agreed that the district court lacked subject matter jurisdiction, and affirmed. In its jurisdictional analysis under the first clause of section 1605(a)(2), the court stated that the phone call recruiting the plaintiff was merely a "preliminary step" or a "precursor" to a commercial transaction. *See id.* at 1513. Hence, the court concluded that "[t]he link between a recruitment phone call in [the United States] and the [intervention of the Saudi government] two-and-one-half years and two employers later is, in our view, too attenuated to constitute a 'direct causal connection.' " *Id.* at 1514.

[1] In the present case, however, it is clear from the record that the recruitment and hiring of Nelson, in the United States, was part of a process having "substantial contact with the United States." The recruitment was conducted by the Hospital Corporation of America (HCA), which in 1973 contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the Hospital. HCA, a corporation organized under the laws of the Grand Cayman Islands, is the wholly owned subsidiary of an American corporation. The contract created an agency relationship between HCA and Saudi Arabia. Under the contract, HCA was empowered to "recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust their salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel." In addition, the contract expressly provides that all "employment contracts will be between [Saudi Arabia] and the employee, but may be executed for [Saudi Arabia] by HCA as agent." The contract also states that "[a]ll expatriate personnel recruited must be acceptable to [Saudi Arabia] which acceptability shall be evidenced by issuance of an entrance visa."

On the facts presented we agree with Nelson that the recruitment and hiring in the United States constituted a "commercial activity" of Saudi Arabia, within the meaning of the FSIA. Nevertheless, in order to establish subject matter jurisdiction under the FSIA, the court must also conclude that the detention and torture of Nelson, in Saudi Arabia, were "based upon" Nelson's recruitment and hiring in the United States.

[2] Judicial authority reveals that a claim is "based upon" the commercial activity of a foreign state when there is a "jurisdictional nexus" between the acts for which damages are sought, and the foreign sovereign's commercial activity.

For example, in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir.1984), the plaintiff, the owner of a vessel, sued the defendants, an agent of the Algerian government and the Republic of Algeria, to recover for the loss of the vessel. The district court granted the defendant's motion to dismiss. On appeal, the plaintiff asserted subject matter jurisdiction under the first clause of section 1605(a)(2). *See id.* at 199.

The court in *Vencedora* noted that the courts had varying interpretations of the jurisdictional reach of the first clause of section 1605(a)(2). *See id.* at 199-200. After reviewing four different formulations of the jurisdictional scope of the first clause of section 1605(a)(2), the court adopted the nexus approach. Under the nexus view or requirement, there is subject matter jurisdiction if there is a "nexus" between the acts giving rise to liability, and the commercial activity carried on by the foreign state in the United States. *See id.* at 202. *See also De Sanchez*, 770 F.2d at 1391 (subject matter jurisdiction under section 1605(a)(2) requires a "jurisdictional nexus with the United States").

In addition, the Court of Appeals for the Ninth Circuit has held that there is subject matter jurisdiction under the first clause of section 1605(a)(2) if there is "a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir.1989). Similarly, the Court of Appeals for the Third Circuit has stated that "[i]t is essential that there be a nexus between the plaintiffs' grievance and the sovereign's commercial activity." *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir.1981). *Cf. Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir.1988) (subject matter jurisdiction under section 1605(a)(2) requires "a connection" between the commercial activity and the act complained of in the suit).

[3] This jurisdictional nexus requirement between the act complained of or grievance, and the commercial activity or business enterprise conducted by the foreign state is salutary and necessary to satisfy both the congressional policy of the FSIA and sound principles of comity. The nexus requirement implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable. It is comparable to the requirement that there be a causal connection in order to impose liability in the civil law of torts. The jurisdictional nexus requirement of the FSIA finds a domestic parallel in the requirement of a nexus in the application of long-arm statutes. *See, e.g., American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178-79 (1st Cir.1989).

Saudi Arabia contends that the district court lacks subject matter jurisdiction under the FSIA since Nelson's claims "are based upon the governmental exercise of police power in a foreign country." Saudi Arabia asserts that "[t]he claims are based upon the acts of the Saudi police and prison officials—'governmental' acts beyond the reach of the commercial activity exception."

In support of its contention, Saudi Arabia cites *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir.1980). In *Arango*, the plaintiffs contended that they suffered injuries when their vacation tour, which was sponsored in part by the defendant, the national airline of the Dominican Republic, was terminated. The plaintiffs asserted that, because their names were on a list of undesirable aliens, upon their arrival in the Dominican Republic immigration officials denied them entry into the country, "man-handled" them, and "involuntarily rerouted" them to the United States. *See id.* at 1373. The plaintiffs sought damages under breach of contract and several tort claims, including false imprisonment and battery. The district court granted the defendant's motion to dismiss on all claims. *See id.* at 1374.

The Court of Appeals for the Fifth Circuit dismissed the appeal because, under Rule 54(b) of the Federal Rules of Civil Procedure, the order granting the defendant's motion to dismiss was not a final order. *See id.* at 1377-78. Notwithstanding its dismissal of the appeal on separate procedural grounds, the court of appeals discussed the applicable substantive law, and, "in the interest of expediency, proceed[ed] to offer [the district] court some guidance in its further handling of these issues." *Id.* at 1378. The court considered whether there was subject matter jurisdiction, under the first clause of section 1605(a)(2), for the claims of false imprisonment and battery. The court stated that in "man-handling" the plaintiffs during the denial of their entry into the country, the defendant "acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself." *Id.* at 1379. The court, however, concluded that the defendant's actions which gave rise to the claims for breach of warranty and breach of contract were connected to the defendant's commercial activity. Hence, the district court would have had subject matter jurisdiction over these claims under section 1605(a)(2) of the FSIA. *See id.* at 1379-80.

Saudi Arabia also cites *Gregorian v. Izvestia*, 871 F.2d 1515, 1521-22 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 237, 107 L.Ed.2d 188 (1989). In *Gregorian*, the plaintiffs brought suit against the defendant *Izvestia*, a newspaper of the Soviet government, contending that they were libelled by an article published in *Izvestia* which, according to the plaintiff, was written and published so that agencies of the Soviet government could "avoid contractual obligations to plaintiffs resulting from alleged promises to pay for medical equipment transported to the Soviet Union by plaintiffs." *Id.* at 1516. The plaintiffs contended that the libel was a "commercial activity," within the meaning of the FSIA, since it "was published with the *purpose* of injuring plaintiffs by avoiding commercial obligations." *Id.* at 1521 (emphasis in original). The court noted that, under the FSIA, the court must look to the "nature" of the activity at issue, rather than its purpose. *See id.* (citing 28 U.S.C. § 1603(d)). The court found that because *Izvestia* articles are " 'official commentary of the Soviet government,' " publishing and writing them " 'constitutes an activity whose essential nature is public or governmental.' " *Id.* (quoting *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 856 (S.D.N.Y.1978)). Hence, the libel claim was dismissed for lack of subject matter jurisdiction under section 1605(a)(2). *See id.* at 1522.

[4] In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia. In his complaint, Nelson alleged that, in the course of his duties, he discovered safety hazards at the Hospital and that he reported these hazards to an in-

vestigative body of the Saudi government. Nelson further asserted that as a result of those actions, "[h]e was summoned . . . by agents or employees of [the Hospital] to the [H]ospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by agents or employees of SAUDI ARABIA. . . ."

Unlike the facts in *Arango*, in this case the actions of Saudi Arabia resulted from and were directly attributable to Nelson's employment. Furthermore, the Hospital's job description for monitoring systems engineer, the specific position for which Nelson was recruited and hired in the United States, including recommending modifications to existing equipment. The Hospital's job description also states that a monitoring systems engineer "[a]ssures compliance with safety regulations[,]" and "[t]roubleshoots problems and implements corrective action." Hence, detecting and reporting safety violations at the Hospital was a required employment duty for the position for which Nelson was recruited and hired in the United States.

Saudi Arabia, however, asserts that the actions taken against Nelson were the result of Nelson's submission of a false diploma from the Massachusetts Institute of Technology in his application for employment. In making this argument, Saudi Arabia in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction.

There is also a separate question as to whether the district court properly dismissed Nelson's claim against Royspec. Nelson asserts that Royspec, an instrumentality of the Saudi government, is within the subject matter jurisdiction of the court, under the FSIA, since it "was directly involved in the recruitment of Mr. Nelson."

[5] It is undisputed that Royspec, derived from Royal Specialist Purchasing Services, was founded by the Hospital

in 1979. It is also undisputed that Royspec maintains an office in Maryland, and acts as the purchasing agent for the Hospital, in the United States. Furthermore, Nelson was given the phone number of Royspec's Maryland offie so that his family could contact him, while he was in Saudi Arabia, in the event of an emergency. We also note that four telegrams, all of which acknowledge Nelson's employment, contain the telex designation "ROSPEC," which, according to Nelson, may be the designation for Royspec. Although Saudi Arabia denies that the designation "ROSPEC" represents Royspec, on the record before the court and under the FSIA, we conclude that Royspec is within the subject matter jurisdiction of the court.

Finally, our holding is not based upon the act of state doctrine but on the interpretation and application of the FSIA. On the facts presented we hold that the district court erred in determining that it did not have subject matter jurisdiction.

CONCLUSION

Since we conclude that, on the facts presented, the recruitment and hiring of Nelson in the United States was a "commercial activity" of the Saudi government, and that Nelson's subsequent detention and torture were "based upon" Nelson's recruitment and hiring in the United States, the district court erred in determining that there was no subject matter jurisdiction under the FSIA. Accordingly, we REVERSE the judgment of the district court, and REMAND the case.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1791-Civ-NESBITT

SCOTT NELSON and
VIVIAN NELSON,

Plaintiffs,

vs.

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, and ROYSPEC,

Defendants.

FILED BY D.C.
AUG 11 1989
ROBERT M. MARCH
CLERK,U.S. DIST. CT.
S.D. OF FLA. MIAMI

MEMORANDUM OPINION

This cause is before the court on Defendants' motions to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 - 1611.

Facts

King Faisal Specialist Hospital ("KSFH"), located in Riyadh, Saudi Arabia, is owned and controlled by the Saudi government. Royspec (short for "Royal Specialists"), a separate corporate entity also owned and controlled by the Saudi government, is KFSH's purchasing agent. Royspec maintains an office in Maryland, and purchases hospital supplies and equipment in the United States. Until 1979, a U.S. corporation performed both purchasing and employee recruitment functions for KFSH in the United States, but in that year, the Saudi government created Royspec as purchasing agent for KFSH.

Plaintiff Scott Nelson was hired as Monitoring Systems Engineer at KFSH after being recruited for the position by

Hospital Corporation of America ("HCA") or an affiliated company. After a job interview in Saudi Arabia, Nelson returned to the United States, and in November 1983, while in Miami, signed an employment contract with KFSH. Nelson began his job in Riyadh the following month after attending orientation sessions conducted by HCA or an affiliated company in Tennessee.

As set forth in his job description, Nelson was responsible for assuring compliance with safety regulations, as well as for coordinating all technical activities and recommending modifications of the hospital's equipment. Nelson alleges that he repeatedly reported safety violations to a government commission and in retaliation, government agents unlawfully arrested him.[1] He further alleges that he was held against his will for 39 days, during which time he was interrogated, shackled, beaten, and tortured. In a sixteen-count complaint against KFSH, Royspec, and the Kingdom of Saudi Arabia, Nelson and his wife attempt to state causes of action based on international law, common law torts, and derivative claims.[2]

Discussion

In two separate motions to dismiss, the Defendants question this court's subject-matter jurisdiction over the complaint. Nelson's complaint alleges that jurisdiction is premised upon diversity of citizenship, 28 U.S.C. § 1331, and the Alien Tort

[1]Defendants allege that Nelson was arrested when the government discovered he had misrepresented his credentials, rather than in retaliation for reporting safety violations; however, those disputed facts are not relevant to the motions to dismiss.

[2]In a separate complaint, case no. 88-0484-Civ-Nesbitt, the Nelsons are suing HCA and HCA International Company for negligent failure to warn of the hazards associated with working in Saudi Arabia. Although the cases arise from the same facts, the two actions were never officially consolidated by any order of this court.

Statute, 28 U.S.C. § 1350. In January of this year, however, the United States Supreme Court expressly held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 690 (1989). Therefore, this court's subject-matter jurisdiction, if it exists at all, must be premised upon 28 U.S.C. § 1330(a), which provides that the district courts shall have original jurisdiction of any action against a foreign state if the foreign state is not entitled to immunity under the FSIA.[3]

The FSIA grants immunity to foreign states, with certain exceptions outlined in § 1605. The parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1. That section states, "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which the action is based upon a commercial activity carried on in the United States by a foreign state." A "commercial activity carried on in the United States by a foreign state" is defined as commercial activity carried on by the foreign state and having "substantial contact with

[3]The question of whether a foreign state is entitled to immunity involves resolution of factual issues, complicated in this case by the separate complaint against two U.S. corporations. The United States Court of Appeals for the Eleventh Circuit has noted that a district court is not required to accept the allegations of a complaint as true if a 12(b)(1) motion attacks the asserted factual basis of jurisdiction. *See Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982). Under the FSIA, however, the burden is on the party seeking immunity to establish that no exception to immunity applies. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) (citing H.R. Rep. No. 1487, 94th Cong. 2d Sess. 17 (1976); *Behring Internat'l, Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 396, 405 & n. 9 (D.N.J. 1979)). Defendants in this case are in the position of having to prove a negative, with the advantage that the allegations of the complaint are *not* presumed to be correct. The court has been careful to confine its resolution of the jurisdictional issue to this case without resolving the disputed issues raised in the related case against HCA and HCA International.

the United States." 28 U.S.C. § 1603(e). A "commercial activity" is further defined as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d).

The inquiry, therefore, is two-fold: first, did any of the Defendants carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities?

The parties do not dispute that Royspec, which maintains an office in Maryland and purchases supplies and equipment in the United States, carries on commercial activities in this country. The only commercial activities allegedly undertaken in this country by Saudi Arabia and KFSH, however, relate to Nelson's recruitment. Neither KFSH nor the Saudi government was directly involved in Nelson's recruitment; rather, KFSH or the government entered into a contract with a U.S. corporation, which performed the actual recruitment activities. The agreement with the American corporation may represent a commercial transaction, but Nelson was not a party to that contract. In fact, the agreement serves to separate the Saudi defendants from recruitment activities in the United States, because the U.S. corporation in essence acted as a middleman: Nelson dealt with the U.S. corporation, which in turn had an agreement with a Saudi governmental entity in Arabia.

Nelson's complaint, however, alleges that the recruitment arrangement established an agency relationship between the Defendants and the U.S. corporation. This allegation implicates the related case against HCA and HCA International, because Nelson seeks to hold the Saudi government responsible for any duty breached by its alleged agent. The court does not find it necessary to resolve the agency question, which may be a pivotal factual issue in the related case, because the link between the recruitment activities and the Defendants is not

sufficient to establish "substantial contact" with the United States.

In discussing the meaning of "substantial contact" under § 1603(e) of the FSIA, the United States Court of Appeals for the District of Columbia Circuit has referred to the statute's legislative history. That court noted that Congress gave several examples of substantial contact, such as transactions performed in whole or in part in this country, import-export transactions, business torts, and financing or loan agreements involving American financial institutions. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, reprinted in U.S. Code Cong. & Admin. News 1976, pp. 6604, 6615, 6616). The Court finds that the recruitment activities purportedly undertaken by Defendants, albeit indirectly through their alleged U.S. agents, do not quality as substantial contact between a foreign state and the United States under any of these examples. Although the recruitment agreement could conceivably be considered a transaction performed in part in this country, the transaction involved only the Saudi government and a U.S. corporation. Nelson was not a party to that contract; rather, he was involved in a separate transaction with the U.S. corporation. The court therefore concludes that for purposes of Nelson's complaint, the Saudi defendants have not had substantial contact with the United States.

Nelson also argues that because he signed his employment contract with KFSH while in Miami, KFSH has had substantial contact with this country. The court disagrees. Nelson was interviewed by KFSH in Saudi Arabia, and the employment contract was to be performed in Saudi Arabia. It is a fortuitous happenstance that Nelson signed the agreement while in Miami, rather than while in Saudi Arabia or at some other location. As Congress noted, the definition of substantial contact

was "intended to reflect a degree of contact beyond that occasioned simply but U.S. citizenship or U.S. residence of the plaintiff." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976).

For these reasons, the court concludes that neither KFSH nor Saudi Arabia has carried on commercial activity in the United States, as defined in § 1603(d) and (e) of the FSIA. The court has found, however, that Royspec has been engaged in commercial activity; accordingly, the court must proceed to the second step in the analysis and consider whether Nelson's complaint is based on Royspec's commercial activity.

Although the United States Court of Appeals for the Eleventh Circuit has not considered the interpretation of "based upon" as used in § 1602(a)(2), the former Fifth Circuit has stated that the focus of the inquiry "is on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity." *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980). In discussing the *Arango* decision, as well as decisions from other federal courts, the current Fifth Circuit has noted that *Arango* is consistent with the so-called "nexus test," in which the court looks for a nexus between the commercial activity and the allegations of the complaint. *See Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 203 (5th Cir. 1984). Therefore, the appropriate inquiry in the instant case is whether Nelson's complaint has a connection or nexus with Royspec's commercial activity in this country.

As noted, Royspec is the purchasing agent for KFSH. The only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency. The court finds absolutely no nexus between Royspec's business

and the torts alleged in Nelson's complaint (negligent failure to warn, battery, false imprisonment, and derivative claims by Vivian Nelson). Because no nexus exists between the torts and the commercial activity, the exception to immunity under § 1602(a)(2) is inapplicable to Royspec, and the court is therefore without subject-matter jurisdiction to consider Nelson's claims against Royspec.

Furthermore, even if the court had determined that KFSH and Saudi Arabia had carried on commercial activites having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint. A different question would be presented if Nelson had alleged some type of commercial cause of action arising from the employment contract.[4] The gravamen of Nelson's complaint, though, is an action for personal injuries under various theories of law. Although Nelson argues that but for his recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries, the court finds this "connection" far too tenuous to support jurisdiction over a foreign sovereign.

Similarly, the court finds that Nelson's causes of action based on negligent failure to warn have no nexus with commercial activities in this country. Such a conclusion is implicit in the finding that neither KFSH nor Saudi Arabia's commercial activities had substantial contact with the United States. Nelson argues that he should have been warned when recruited that the job for which he was hired (reporting safety violations to the Saudi government) involved the risk of imprisonment and torture. Nelson does not allege that the commercial activities

[4]The court recognizes, however, that if Nelson had pleaded a contract cause of action, the forum selection clause of the employment contract would require the parties to litigate in Saudi Arabia.

indirectly undertaken by the Saudi defendants in this country were for the purpose of imprisoning and torturing U.S. citizens. Again, the "connection" between the cause of action alleged and the Defendants' commercial activities would be too tenuous to support subject-matter jurisdiction over a foreign sovereign.

For the above-stated reasons, the court concludes that all three Defendants have met their burden of establishing sovereign immunity, and that the court lacks subject-matter jurisdiction to consider Nelson's claims against the Saudi defendants. The court therefore declines to reach the issue of whether the act of state doctrine would apply to the facts of this case.[5]

This cause will be DISMISSED for lack of subject-matter jurisdiction under 28 U.S.C. § 1330(a) by separate order. The trial date in case no. 88-0484-Civ-Nesbitt will also be set by separate order.

DONE and ORDERED in chambers, Miami, Florida, this 11th day of August 1989.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: Jorge A. Duarte, Esq.
Marc Cooper, Esq.
Maureen E. Mahoney, Esq.
Scott E. Perwin, Esq.

[5]The court also finds it unnecessary to consider the question of venue, although Defendants' motions devoted more time to that issue than to the question of subject-matter jurisdiction. It is axiomatic that the court must determine whether it has jurisdiction over a matter before reaching other issues.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5981

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL - 1 1991
MIGUEL J. CORTEZ
CLERK

SCOTT NELSON and VIVIAN NELSON,
Individually and as Husband/Wife,

Plaintiffs-Appellants,

versus

SAUDI ARABIA, KING FAISAL SPECIALIST
HOSPITAL, ROYSPEC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

**ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC**

(Opinion _____, 11th Cir., 1991, 923 F.2d 1528).
( )

Before: EDMONDSON and BIRCH, Circuit Judges, and RE*, Chief Judge.

---

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation, has retired from federal service and took no part in deciding the pertinent petition or suggestion. The petition was decided by a quorum. *See* 28 U.S.C. § 46(d); 11th Cir. R. 34-2(a).

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

The decision in this case does not purport to address the applicability of the act of state doctrine to this case. This issue is open for the consideration of the district court on remand.

ENTERED FOR THE COURT:
/s/J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

APPENDIX D
No. 89-5981

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

SCOTT NELSON and VIVIAN NELSON,
Plaintiffs-Appellants,

v.

SAUDI ARABIA, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF REHEARING AND SUGGESTION FOR REHEARING IN BANC

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CERTIFICATE OF INTERESTED PERSONS

The United States, as *amicus curiae*, adds the following names to the certificates previously filed by the parties: Department of Justice attorneys:

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Dexter W. Lehtinen
Douglas Letter

Department of State attorneys:

Edwin D. Williamson
Linda Jacobson

REQUIRED STATEMENT FOR IN BANC SUGGESTION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of this circuit, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether inherently sovereign law enforcement activities of officials of a foreign state, carried out in that country, can be challenged in United States courts under the commercial activities exception to sovereign immunity in the Foreign Sovereign Immunities Act.

2. Whether jurisdiction exists under the Foreign Sovereign Immunities Act to challenge non-commercial foreign state conduct when separate commercial conduct is used to establish the required nexus with the United States for jurisdiction under that statute.

/s/ Douglas Letter
Attorney of record for *amicus curiae* United States

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* Authorities chiefly relied upon are marked by asterisks.

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 89-5981

SCOTT NELSON and VIVIAN NELSON,
Plaintiffs-Appellants,

v.

SAUDI ARABIA, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF REHEARING AND SUGGESTION FOR REHEARING IN BANC

INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit, and Federal Rule of Appellate Procedure 29, permitting *amicus curiae* filings by the United States. We support rehearing and *in banc* consideration because the panel's opinion incorrectly applies an important federal statute with major foreign policy ramifications.

This case involves a suit filed in federal district court by two American citizens against a foreign state — Saudi Arabia — and two of its instrumentalities concerning the police activities of that state. A panel of this Court reversed the decision by the district court and found jurisdiction to sue these foreign defendants in a United States court under one part of the commercial activities section of the Foreign Sovereign Immunities Act (the FSIA) (28 U.S.C. 1602 *et seq.*).

The United States has a very substantial interest in the application of the FSIA, which is the only means by which foreign states may be sued in United States courts. See *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 434 (1987). Foreign relations depend to a large extent on reciprocal treatment between two states. Thus, if police activities of foreign states are deemed commercial and questioned and punished in United States courts, it is likely that the law enforcement conduct of the United States will also be called into account in foreign courts. And, American law enforcement officials will have to appear in foreign courts to defend their conduct.

Further, if the prevailing law in this country is that foreign police activity can be judged in our courts by our standards, it will be difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities. Even when local foreign law would permit the United States to raise immunity defenses that would not be available under the FSIA, the United States nevertheless uses that statute as a standard for our own claims of immunity in foreign courts. Under this practice, the United States would be foreclosed from asserting immunity for claims in foreign courts involving our law enforcement activity.

Consequently, although Congress has in the FSIA clearly assigned to the federal courts the responsibility to determine

whether foreign states may be sued here consistently with that statute, the Executive Branch — which is responsible for the foreign relations of the United States — has a keen interest in how the courts apply the law. The FSIA's "intent to deprive the Executive of a conclusive say in this area does not mean that the Executive is to avoid any role in the adjudicatory process." *Practical Concepts Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1552 n. 21 (D.C. Cir. 1987). The Executive Branch maintains a legitimate interest in the correct interpretation of the FSIA because of its foreign policy impact. *Id.* at 1545 n. 2.

As described below, we believe that the panel decision here erroneously applies the FSIA in a serious way. Plaintiffs' complaint focuses on the conduct of Saudi police authorities in arresting and jailing Scott Nelson. The panel deemed the charges justiciable because it found a "nexus" between the alleged tortious police activity of the Saudis and Saudi commercial activity in the United States.

But this reasoning is flawed because, although plaintiffs allege highly reprehensible conduct by Saudi officials, the fact remains that law enforcement activity is *sovereign* in nature. Congress had no intent in the FSIA to waive immunity, under the statute's commercial activities provision, for foreign governments to be sued here for their governmental acts such as police activities. Indeed, as far as we are aware, this is the first and only instance in which any federal court has found jurisdiction over foreign law enforcement activities under the FSIA commercial activities exception.

Substantial precedent from this Court and other courts of appeals supports our view, and casts grave doubt on the panel ruling.

Moreover, the panel separately erred in finding a sufficient nexus between the commercial activity in the United States

and the conduct actually being challenged. Its ruling on this point is inconsistent with many other circuit decisions which make clear that the commercial activity providing the jurisdictional nexus with the United States must itself be the activity on which the lawsuit is based. Here, it is not.

We nevertheless wish to make clear at the outset that the United States takes *no* position regarding the underlying merits in this case. Plaintiffs have alleged beatings and torture by Saudi agents, activity that we strongly condemn. The record reveals, however, that there is sharp disagreement regarding the facts underlying plaintiffs' claims.

Officials from the United States Department of State have had extensive contact with both the plaintiffs and with the Saudi government regarding this matter. We have attempted to assure that the plaintiffs will have an appropriate forum in which to present their claims. This process is ongoing. If it fails, the United States retains the option of espousing plaintiffs' claims against Saudi Arabia — if it finds them to have merit — as an official matter between the two governments.

Nevertheless, our position is that Congress did not make the types of claims at issue here cognizable in United States courts, and that the panel's interpretation of the FSIA is likely to cause serious difficulties for the United States in future cases brought in foreign courts.[1] We therefore urge that the panel grant rehearing or that the full Court hear this case *in banc*.

---

[1]Because plaintiffs have alleged highly reprehensible conduct by a foreign state, this case calls to mind the observation by the Second Circuit in a difficult case also involving asserted heinous activity, but in which foreign sovereign immunity was upheld, *Letelier v. Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984), *cert denied*, 471 U.S. 1125 (1985) ("How one wishes to decide a case comes lightly to mind, on a wing; but often how one must decide it comes arduously, weighed down by somber thought. To rule otherwise here would only illustrate once again that hard cases make bad law").

STATEMENT

1. *The FSIA Scheme*

In *Jackson v. People's Republic of China*, 794 F.2d 1490, 1492-93 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), this Court described the shift in the United States from granting absolute immunity to foreign states in the federal courts to a restrictive theory of immunity, under which immunity is confined to suits involving public acts of a foreign state. This restrictive theory was codified in the FSIA in 1976. *Id.* at 1493.

In that statute, Congress drew a critical distinction between the commercial acts of foreign states and their public or sovereign ones. "Where a foreign state's sovereign acts are the basis of a suit, the United States refrains from exercising jurisdiction out of respect for the defendant's coequal sovereign status." *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

Relevant to this case is the FSIA waiver of foreign sovereign immunity for cases "in which the action is based upon a commercial activity carried on in the United States by a foreign state***." 28 U.S.C. 1605(a)(2). That is the section upon which jurisdiction was found by the panel here.

"[C]ommercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d).[2]

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[2]The FSIA also contains a waiver for certain tort actions (28 U.S.C. 1605(a)(5)), but that section is not applicable here because it covers only cases in which the damage or loss occurs in the United States. See *Amerada Hess*, 488 U.S. at 439-41.

2. *This Litigation*

Plaintiff Scott Nelson is an American citizen who answered an advertisement concerning employment in Saudi Arabia in the King Faisal Specialist Hospital (the Hospital), a government instrumentality. The recruitment was conducted by the Hospital Corporation of America, an American company operating in this country under a contract with the Saudi government. See *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1530 (11th Cir. 1991).

Nelson was interviewed in Saudi Arabia, and accepted employment as an engineer with the Hospital, signing the employment contract in the United States. As part of the hiring process, Nelson submitted what he now concedes is a fraudulent diploma from the Massachusetts Institute of Technology. *Id.* at 1530, 1536.

Nelson began work at the Hospital in Saudi Arabia, and part of his job included monitoring equipment in the Hospital building. Nelson contends that in March 1984, he found a building safety hazard, which the reported to Saudi authorities. The Saudis meanwhile discovered the fraudulent nature of Nelson's diploma, and in September 1984 he was summoned to the Hospital security office. *Id.* at 1530.

Nelson contends that he was taken from the Hospital to a jail, where he was beaten and tortured by Saudi officials. He was incarcerated for 39 days and was released following his pardon by the Saudis after intervention by United States authorities. *Id.* at 1530.

Several years after returning to the United States, Nelson filed this action against Saudi Arabia, the Hospital, and a Saudi agency doing procurement business in this country. He claims serious physical injuries and raises a number of tort causes of action including battery, unlawful detainment, wrongful arrest and imprisonment, inhuman torture, and negligent failure to warn that these torts might occur.[3] The district court dismissed the complaint, finding a lack of sufficient ties between the alleged tortious conduct and any commercial conduct by the Saudis.

A panel of this Court then reversed that ruling in an opinion written by Chief Judge Re of the United States Court of International Trade, sitting by designation. 923 F.2d at 1536. It found jurisdiction solely under the FSIA exception for commercial activity carried on in the United States by a foreign state. *Id.* at 1533.

The panel held that the "recruitment and hiring [of Nelson] in the United States constituted a 'commercial activity' of Saudi Arabia, within the mearning [sic] of the FSIA." *Ibid.* It then stated that cases applying the FSIA require that there be a nexus "between the acts for which damages are sought, and the foreign sovereign's commercial activity." *Id.* at 1534. The panel concluded that jurisdiction was present because "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 1535.

Because there was this connection, the panel found jurisdiction under the commercial activities exception despite the fact that Nelson was complaining about police activities. *Id.* at 1534-35.

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[3]Nelson also sued the Hospital Corporation of America in a separate action which was dismissed under the statute of limitations and for contributory negligence stemming from Nelson's submission of the falsified diploma; that ruling is now on appeal to this Court. See *Nelson v. Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990).

REASONS FOR GRANTING REHEARING

This is one of those rare instances in which rehearing is warranted because the panel opinion radically departs from established law and is at odds with Congress' intent. It is difficult or impossible to square the ruling here with the Court's precedent in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980)[4], and the opinion is inconsistent with a number of decisions by other circuits interpreting the FSIA.

1. In *Arango*, the plaintiffs there sued Dominicana, a state airline, after they were refused admission to the Dominican Republic by immigration officials, and were immediately rerouted elsewhere, being manhandled in the process. This Court first dismissed the appeal, but then issued guidance to the district court for its further handling of the case. Dominicana contended that it could not be sued for claims arising out of the acts of Dominican immigration officials, which are not commercial in nature, even though the airline admitted that it engaged in commercial activity in the United States and had carried the Arangos to the Dominican Republic.

The Court accepted this argument because Dominicana's actions regarding the rerouting of the Arangos was not commercial; the airline was merely pressed into the service of carrying out a governmental law enforcement function: refusal to allow entrance and bodily expelling the Arangos from the Dominican Republic. 621 F.2d at 1379.

As in the case at bar, the allegedly tortious activity was certainly connected with commercial activity since Dominicana flew the Arangos to the Dominican Republic on a paid ticket. Yet, the police activity of which the Arangos complained was

[4]See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*in banc*).

not cognizable in a United States court because it was sovereign in nature, and was not the activity that provided the jurisdictional nexus to the United States. By contrast, the Court permitted other causes of action by the Arangos to go forward since they challenged conduct of a commercial kind. 621 F.2d at 1379-80.

The panel ruling at bar cannot be squared with *Arango* because it permits review of foreign law enforcement conduct, which is closely analogous to the activity which the Court there held could not be reviewed in United Sates courts.

2. In addition to being in conflict with *Arango*, the decision here is at odds with considerable precedent from other circuits which does not permit review of inherently sovereign activity — such as law enforcement conduct — under the commercial activities exception.

The legislative history of the FSIA shows that Congress did not intend any of the various clauses of the commercial activities exception to remove immunity for essentially non-commercial acts. To the contrary, the relevant discussion in the House and Senate reports makes clear that Congress intended that only actual commercial activity itself be covered within this exception. See H.R. Rep. 94-1487, 94th Cong., 2d Sess. 16, 18-19 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 18-19 (1976). Both reports speak of allowing suits for acts that are "commercial or private in nature." *Ibid.*

This congressional intent was recognized and applied by the Ninth Circuit in *Gregorian v. Izvestia*, 871 F.2d 1515, 1521-22 (9th Cir.), *cert. denied*, 110 U.S. 237 (1989), a case in which the United States also filed a statement of interest in order to call the court's attention to the sovereign nature of the activity involved.

In *Gregorian*, the plaintiff claimed that a Soviet Union publica-

tion had libeled him as part of a strategy to cheat him in a commercial venture; the libel was alleged to be directly related to commercial activity. Nevertheless, the Ninth Circuit held that determination of the contents of an official newspaper is a sovereign act rather than a commercial one, despite the fact that publication of a newspaper can be commercial. Because the actual activity challenged by the plaintiff was sovereign, it was not covered by the commercial activities exception in the FSIA. *Id.* at 1522. Accord *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 584 (E.D. Pa. 1985) (decision on how to "police the activities of its citizens" is "peculiarly governmental and may not be subjected to scrutiny in United States courts"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

In another case closely analogous to this one, the court in ***Herbage v. Meese***, 747 F. Supp. 60 (D.D.C. 1990), similarly found no jurisdiction under the FSIA for claims made against agents of the British government for assertedly wrongful extradition to the United States. The court held that a British constable, detective, and prosecutor were all carrying out sovereign functions in arresting and extraditing the plaintiff. Citing *Arango*, the court determined that there was no waiver under the FSIA for this type of governmental law enforcement conduct. This conclusion held regardless of the plaintiff's allegations that the acts taken by the British police officers were "illegal" and "heinous." *Id.* at 66-67.

Here too, there is no jurisdiction under the FSIA commercial activities exception to immunity because the acts at issue were plainly governmental. Nelson attacks the police conduct of Saudi officials in arresting and confining him. This type of conduct is clearly sovereign rather than commercial; in contrast to commercial activity, it can be carried out only by a government. It is, therefore, not covered by the FSIA com-

mercial activities exception, regardless of whether or not it is intertwined with commercial activity.[5]

As explained in the opening section of this brief, a contrary conclusion is against congressional intent. And, it must be recognized that review of this kind of sovereign activity by a United States court would require examination of Saudi police officials here, as well as questioning in our courts their conduct of police activities in their own country. The panel's ruling is thus likely to expose the United States' own law enforcement conduct to judicial scrutiny in foreign courts.

Numerous cases make clear that it makes no difference for FSIA purposes whether the governmental activity in question is intertwined with commercial activity.

For example, in ***de Sanchez***, 770 F.2d at 1391-92, the Fifth Circuit found no jurisdiction when a plaintiff sued to collect on a check issued by the Nicaraguan Central Bank for payment of a certificate of deposit payable in U.S. dollars. The stop payment order was made by the same Central Bank based on then-current policies regarding preservation of foreign exchange reserves. That act clearly had a nexus to the commercial activity of sale of the certificate of deposit, and the usually commercial activity of sale of foreign currency. But that connection was not sufficient because the key activity was the sovereign one of determining not to honor the payment check. Accord, *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 884-85 (D.C. Cir. 1988); *MOL, Inc. v. The People's Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

---

[5]Nelson has also alleged a cause of action for failure to warn that he may be subjected to the type of wrongful conduct that he alleges. However, since that cause of action would require review of the sovereign police activities, the failure to warn claim should not stand on its own.

And, in *Letelier*, the Second Circuit declined to approve execution against the Chilean national airline in a case concerning assassination of a former Chilean ambassador in the United States, and airline personnel were assertedly involved in the plot. 748 F.2d at 797. The airline clearly engaged in commercial activity here, but the act in question was a governmental one — state sponsored assassination. That act was immune under the FSIA even though airline personnel had allegedly taken actions — such as providing transportation — to make the assassination possible. *Id.* at 794. Citing this Court's decision in *Arango*, the Second Circuit focused on the allegedly wrongful activity itself, and held that any participation by the airline in the plot was not commercial in nature. *Id.* at 797-98.

The ruling here is firmly at odds with these holdings.

3. Additionally, the panel here erred in concluding that there is a sufficient connection between the allegedly tortious conduct of the Saudi police officials and the commercial activity found to occur in the United States. In finding such a connection, the panel applied an analysis rejected by other courts of appeals.

For example, in *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991), the Fifth Circuit made clear that FSIA jurisdiction *cannot* be based merely on activity that is intertwined with commercial activity. Rather, the court explained — relying on *Arango* — that "[i]n order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be *the activity on which the lawsuit is based.*" *Id.* at 387. Accord *ibid.* ("[b]ecause Pemex's commercial acts do not form the basis for Stena's complaints, the commercial activities exception does not apply").

Here, the commercial activity relied upon by the panel is the recruitment and hiring of Nelson in the United States. Nelson's claims are based not on those activities, but on the actions of the Saudis who jailed him. Thus, the nexus between the relevant commercial activity and the allegedly tortious conduct is *not* the same as the connection between the commercial activity and the United States. The panel confused this key difference.

CONCLUSION

For the foregoing reasons, as *amicus curiae*, the United States urges that the panel rehear this case, or that the full Court consider it *in banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 1991, I served two copies of the foregoing Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing In Banc upon the following named counsel, by first class, United States mail, postage prepaid:

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Supreme Court, U.S.
FILED
OCT 23 1991
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(2)

No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a foreign instrumentality that procured the torture of an American citizen for doing the job its agent hired him in the United States to do.

2. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a foreign country under the color of whose law an American citizen was tortured for doing the job its agent hired him in the United States to do.

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No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

THERE IS NO ISSUE OF "EXERCISE OF POLICE POWER" IN THE RECORD.

The Petitioners have misstated the holding of the Court of Appeals. Contrary to the Petitioners' boldface claim, the Eleventh Circuit did *not* hold that the "exercise of police power" constituted "commercial activity" under the FSIA. That issue was *never* in the case because the only document in the case is the Respondents' Complaint filed

in district court. There was no Answer filed by the Petitioners. There was no discovery. There were no interrogatories. Neither side ever alleged any facts pertaining to "exercise of police power." Neither the district court's memorandum opinion nor the Eleventh Circuit's unanimous opinion refer to or say anything about "exercise of police power."

This is a case only of the subject-matter jurisdictional sufficiency of the Complaint. If the Petitioners wish to defend on the ground of sovereign immunity, they have the burden of raising that defense in their Answer, and answering appropriate interrogatories, at the trial court level. They have not yet answered the Complaint, much less discharged the burden.

The issue of "exercise of police power" is spurious, invented perhaps to cast in a false light the importance of this case for the purpose of obtaining a writ of certiorari. Consider what would happen if this Court were to grant the writ of certiorari and hear oral argument. The Justices might pose questions such as "Who arrested Mr. Nelson?" or "When was he arrested—before or after he was tortured?" or "On what charge was he arrested?" or "Why didn't the persons who picked him up identify themselves or notify Mr. Nelson that he was being arrested?" or "Why wasn't Mr. Nelson ever charged with a crime?" or "Why wasn't Mr. Nelson ever brought before a magistrate—or tried—or convicted—or sentenced?" or "What facts support the Petitioners' claim that this is a case of malicious prosecution?" or "Do the Petitioners claim that torturing Mr. Nelson constitutes the exercise of police power?" Yet none of these questions or their cognates could be answered in oral argument because there are no facts in the record about any of these issues. Counsel would be reduced to conflicting and rank speculation; the

oral argument would degenerate into an exercise in futility. This is exactly what Supreme Court Rule 15 was designed to prevent.[1] As Rule 15 states, "the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later."

But even if—in the interest of judicial economy and out of concern for the sensibilities of foreign sovereigns called to account in American courts—the Court might want to speculate at this stage whether or not the torture[2] of Mr. Nelson was an "exercise of police power," there is no assurance that Saudi Arabia or its instrumentalities, when they file an Answer in this case upon remand, will actually make such a claim.[3] If they did, their claim could be unprecedented in the history of law. Respondents are not aware of any case, national or international, in which a government has ever attempted to justify or excuse torture as an "exercise of police power." To the contrary, torture is universally condemned as a heinous violation

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[1] There are other significant misstatements of fact and law in the Petition, which will be addressed later in the course of this Brief.

[2] Mr. Nelson's claim of torture is not a frivolous allegation made for the purpose of obtaining jurisdiction. *See* the summary of evidence of torture in "Request for Espousal of Claims," filed in the Eleventh Circuit, and reprinted as Appendix A to this Brief.

[3] The same is true of the United States if the situation were reversed. Thus, Petitioner's claim that this case implicates important foreign relations issues is wildly overstated. In addition, for reasons to be discussed later in this Brief, Petitioner's claim may not even fairly represent the current position of the United States.

of human rights. In Saudi Arabia, as in nearly all countries, torture is a crime. But even more significantly with respect to Saudi Arabia, torture is a grave sin against the Koran: he who tortures another will himself be tortured in the afterlife. Thus, the very assumption that Saudi Arabia will answer upon remand that the torture of Mr. Nelson was an "exercise of police power" could itself be offensive to the sovereign's religious sensibilities! The Respondents make no such assumption, and see no reason why this Court should make it. All along Respondents have claimed only that Mr. Nelson was tortured under color of law.

II.

RESPONDENT VIVIAN NELSON'S NON-DERIVATIVE CLAIMS CANNOT BE BRUSHED ASIDE.

There are two Respondents in this case, Scott Nelson and Vivian Nelson. Petitioners have proceeded as if Vivian Nelson is a non-person. In footnote 3 of the Petition, at page 2, Petitioners state:

> "Respondent" as used in the singular herein shall refer to Scott Nelson only, unless otherwise indicated, because Vivian Nelson's claims are entirely derivative.

But the Complaint clearly alleges that

> 13. During the 39 days in which Plaintiff, SCOTT NELSON, was held captive, he was held incommunicado, and his family was not advised of his whereabouts for several days. Once his wife, VIVIAN NELSON, was advised of his situation, she was informed by an agent of SAUDI ARABIA that he could be released in exchange for sexual favors.
>
> 29. [T]he solicitation of sexual favors from Plaintiff VIVIAN NELSON in exchange for her husband's freedom constitutes torture because it caused severe mental pain and anguish in an attempt to coerce her into an action. Further, this treatment was both clearly degrading and an arbitrary and unlawful attack and interference on the Plaintiffs' family life, honor and human dignity.

Since the 21-page double-spaced Complaint is the sole document at issue in this case, it is unlikely that the Petitioners have not read it. Why, then, have they ignored Vivian Nelson's own cause of action? This Court may take judicial notice that Petitioner Saudi Arabia is a nation which legally permits husbands at will to beat and physically discipline their wives, a nation which gives fathers exclusive and unquestioned dominion and control over their children, and a nation which weighs any woman's testimony in court as equivalent to one-half a man's testimony. Have the American attorneys for Saudi Arabia overlooked Vivian Nelson's nonderivative claims because they have subconsciously absorbed some of their client's attitudes toward women? Or are they deliberately attempting to conceal Vivian Nelson's personal claims from this Court?[4] Under either alternative, they vitiate the credibility of their entire Petition by such a tactic.

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[4] Petitioners invite Scott Nelson and Vivian Nelson to pursue their claims in a Saudi court. Petition at 4 n.5. By labelling Vivian Nelson's claims as "entirely derivative," they downplay the fact that no American court would condone remitting her to a judicial system that would clearly deprive her of due process of law. *See* Department of State, *Country Reports on Human Rights Practices for 1989* at 1557 (legal practices in Saudi courts valuing a woman's testimony as one-half that of a man's testimony).

III.

THE STATUTE IN THIS CASE HAS BEEN CONSTRUED ACCORDING TO ITS PLAIN AND ORDINARY MEANING.

The only statute governing the present case is 28 U.S.C. § 1605(a)(2) of the Foreign Sovereign Immunities Act, which states that "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ."

As the Eleventh Circuit found, the Petitioners, themselves and through their agent, engaged in commercial recruitment activity in the United States. They advertised nationally in the *Engineering News* for a Monitoring Systems Engineer to work at the King Faisal Specialist Hospital. Respondent Scott Nelson had a subscription to the *Engineering News* which he received and read at his home in Miami, Florida in September, 1983. He applied for the job and eventually signed and executed the contract of employment in Miami.[5] His job description stated that a monitoring systems engineer "Assures compliance with safety regulations" and "Troubleshoots problems and implements corrective action." *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1535-36 (11th Cir. 1991), Petition at 1a, 16a. Subsequently, in the course of Mr. Nelson's duties at the hospital in Saudi Arabia, he discovered certain safety hazards in the oxygen supply lines. After being unable to

[5] The Petition inaccurately states: "During a respite in the United States from his work in Saudi Arabia, Respondent saw the Hospital's advertisement for an opening in Riyadh." Petition at 3. In fact, Mr. Nelson saw the advertisement for a Monitoring Systems Engineer, placed by the Hospital as agent for King Faisal Specialist Hospital, before he had ever set foot in the Kingdom of Saudi Arabia.

convince his superiors to correct the problem, he reported the safety hazards to an investigative commission of the Saudi government. His "blowing the whistle" embarrassed his superiors at King Faisal Specialist Hospital, who procured his physical torture at the hands of government agents or officials acting contrary to law but under color of law.

Taking the allegations of the Complaint at face value for the purpose of subject-matter jurisdiction, an element of his cause of action is the employment contract he signed in the United States. His torture was an alleged consequence of his legal obligation under the employment contract to monitor safety procedures at the King Faisal Specialist Hospital and to report safety violations. His employers had a correlative duty under the same employment contract to receive Mr. Nelson's recommendations and act upon them in order to ensure the safety of the patients at the hospital. Instead, they arranged to have him tortured. The act of torture, therefore, was clearly "based upon" the terms and scope of his employment under the employment contract he signed and executed in the United States.[6] As the Seventh Circuit said in a very recent case, "an action would be 'based upon' commercial activity in the United States if that commercial activity established the element of breach of duty . . ." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 n.3 (7th Cir. 1991).[7] The Seventh Circuit went on to cite

[6] In contrast, in a case relied upon by the Petitioners, an extraterritorial tort was *not* "based upon" the commercial activity of a foreign instrumentality. Rather, the court held that the foreign instrumentality was a joint tortfeasor and thus, relevant to the plaintiffs' cause of action, not engaged in "commercial activity" at all. *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

[7] The *Santos* decision is discussed further, *infra*.

with approval the *Nelson* decision, stating that in *Nelson* "the court held that jurisdiction was present under the Immunities Act where a foreign government recruited and hired an employee in the United States. The court emphasized that the employee's subsequent detention and torture by the foreign government was for conduct within the scope of his employment duties." 934 F.2d at 894.[8]

The Seventh Circuit's opinion in *Santos* confirms the ease of application of the statute. The core of the present case is that the Respondents' cause of action is "based upon a commercial activity carried on in the United States by the foreign state," as the FSIA provides, because Mr. Nelson was tortured for doing the very job he was hired to do. The *Nelson* decision is a simple application of the plain and ordinary meaning of a statute to a (hopefully) extraordinary and heinous set of facts. The statute itself is the sole, salient, and sufficient basis for subject-matter jurisdiction in the present case, despite the Petitioners' convoluted efforts to argue that the statute does not mean what it says.

IV.

THERE IS NO CONFLICT IN THE CIRCUIT COURTS REGARDING THE APPLICATION OF THE FSIA TO EXTRATERRITORIAL TORTS THAT ARE BASED UPON COMMERCIAL ACTIVITY IN THE UNITED STATES.

The Petition quotes opinions out of context and indiscriminately mixes contract and tort actions in an attempt

[8] It is amazing, but typical, that the Petitioners would cite the *Santos* case as one of the cases of other circuits that is directly in conflict with the *Nelson* decision! The *Santos* decision is not only totally consistent with the *Nelson* decision, but indeed cites *Nelson* with approval.

to conjure up a conflict of statutory interpretation among the circuits. To the contrary, the present case is one of those happy instances where many different judges have read the same statute in exactly the same way—all in predictable accordance with its plain meaning. The question presented is the application of 28 U.S.C. § 1605(a)(2) to an extraterritorial tort committed against an American citizen. As the following inventory summarizes, each and every federal appellate court that has discussed this question has come up with the same answer:

SECOND CIRCUIT. The decedents bought a round-trip ticket for travel to China from an agent of the Chinese airline in the United States, although they were not guaranteed passage on a particular domestic flight in China. In China their ticket for a flight from Nanjing to Beijing was changed to a different flight that then crashed en route. The court found jurisdiction under 28 U.S.C. § 1605(a)(2) because the action for wrongful death in China was based upon the commercial activity in the United States of selling the round-trip ticket. *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11 (2d Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 453 (1987).

THIRD CIRCUIT. The plaintiff was detained and subjected to intolerable conditions in Mexico at the midpoint of his round-trip flight from New York. The court found that his purchase of the round-trip ticket in New York constituted "commercial activity" under 28 U.S.C. § 1605(a)(2), and further found that the extraterritorial tort was a breach of the common carrier's duty "based upon" the purchase of that ticket. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980). This decision of eleven years ago, which has been extensively cited as a seminal interpretation of

the statute,[9] hardly conflicts with *Nelson* as the Petitioners suggest. Rather it is a precise precedent for the *Nelson* case. To reverse *Nelson* would be to upset eleven years of consistent federal court decisions that have followed the *Sugarman* precedent.

FIFTH CIRCUIT. The plaintiffs bought a vacation package tour in Florida on the national airline of the Dominican Republic. But when they arrived in the Dominican Republic, they were denied entry and tortiously manhandled by Dominican immigration officials who saw the plaintiffs' names on an official list of undesirable aliens. The court held that the plaintiffs' action was not "based upon" the commercial activity in the United States (selling a package tour ticket). For irrespective of the reason why the plaintiffs travelled to the Dominican Republic, the tort was committed because their names were on a list of undesirable aliens and not for any reason connected with or based upon the package tour. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

SEVENTH CIRCUIT. An American maintenance company had a lease with Air France, an instrumentality of the French government, to provide Air France with maintenance workers at Orly Airport in France. The plaintiff, an employee of the maintenance company, was injured while working at Orly Airport. The "commercial activity carried on in the United States," under 28 U.S.C. § 1605(a)(2), was the execution of the lease. However, the plaintiff did not claim any rights under the lease as a third party beneficiary or otherwise. Hence the court held that the plaintiff's claim was not "based upon" the lease. *Santos v. Compagnie*

[9] The most recent case following the *Sugarman* precedent appears to be *Schoenberg v. Exportadora de Sal*, 930 F.2d 777 (9th Cir. 1991).

Nationale Air France, 934 F.2d 890 (7th Cir. 1991). The court cited the *Nelson* case with approval, stating that in *Nelson*, unlike *Santos*, the employment contract was an element of the cause of action because Nelson's torture was for conduct within the scope of his employment duties. 934 F.2d at 894.

NINTH CIRCUIT. The decedent was hired as an engineer in the United States to work on a copper mining project in Iran. He was murdered as part of a political revolution that was taking place in that country. The court held that "[n]othing about his murder, however, related to his job, except to the extent his job had brought him to Iran in the first place." *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S.Ct. 510 (1984). Thus, this extraterritorial tort was not "based upon" the commercial activity of hiring the decedent in the United States. The *Nelson* court read 28 U.S.C. § 1605(a)(2) in exactly the same way as the *Berkovitz* court read it. If Berkovitz's death had been job-related in the sense that it occurred as a consequence of his duties as an employee, the *Berkovitz* court impliedly would have come out the same way as the *Nelson* court.[10]

[10] The Petitioners, without mentioning *Berkovitz*, rely on two other Ninth Circuit decisions:

(1) *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 237 (1989). This case involves the publication of a libelous article in a Soviet newspaper. The FSIA specifically grants foreign states complete immunity from "libel" under § 1605(a)(5)(B). The court found this immunity to exist regardless of whether the libel was based upon commercial activity in the United States. 871 F.2d at 1522 n.4. Hence *Gregorian* is totally inapposite to the present case.

(2) *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989). In this case, an Irish airline's commercial operations in the United States consisted of the sale of passenger

(Footnote continued on following page)

DISTRICT OF COLUMBIA CIRCUIT. The plaintiff, an engineer, was enticed to go to Ireland to develop his patented process. He signed a contract in the United States with the encouragement and participation of an instrumentality of the government of Ireland. After moving to Ireland, the plaintiff alleged that his expertise and patent rights were misappropriated. The court held that there was sufficient "commercial activity" under 28 U.S.C. § 1605(a)(2), and that the question on remand was the connection between the commercial activity and the extraterritorial tort of misappropriation:

> Section 1605's "based upon" standard is satisfied if plaintiff can show a direct causal connection between his enticement in the United States and the misappropriations in Ireland giving rise to his claims for an accounting . . .

Gilson v. Republic of Ireland, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982). The Petitioners interpret *Gilson* as requiring a "tighter fit" than other cases that have applied the "based upon" language. Petition at 19. Perhaps it is (since the actual facts had to be developed on remand, one cannot know). Even so, it is hard to imagine a "tighter fit" than the facts of the *Nelson* case where Mr. Nelson did the job he was hired to do and was tortured for doing it.[11]

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[10] *continued*
tickets. The tort, however, was the airline's faulty maintenance work on an airplane engine in Ireland. The court held that the tort did not relate in any way to the airline's commercial activities in the United States and hence could not be "based upon" that commercial activity. *America West Airlines* is similarly inapposite to the present case.

[11] Petitioners also discuss a District of Columbia Circuit case handed down six years after *Gilson*: *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988). However, *Zedan*, as the

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The preceding summary of appellate cases substantiates an observation made by the Supreme Court in the leading case on the Foreign Sovereign Immunities Act:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H.R. Rep. No. 94-1487, p. 7 (1976).[12]

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). Over the past fifteen years, federal courts have clarified the governing standards of 28 U.S.C. § 1605(a)(2) as applied to extraterritorial torts. The present case is, from a legal point of view, a wholly unremarkable part of that consistent federal jurisprudence.

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[11] *continued*
Petitioners admit, is a contract case and not a case of extraterritorial tort. But even if *Zedan* were a tort case, its reasoning is nevertheless totally consistent with *Gilson*.

[12] This statement by the Supreme Court is ignored by the Petitioners, who flatly assert that "Congress's paramount purpose in enacting the FSIA was to ensure that United States courts do not assert jurisdiction over the sovereign acts of a foreign state." Petition at 23-24. Since the Petitioners devote so much time in their brief to the notion of Congressional intent, surely they should have consulted the *Verlinden* case before making such an unsupported declaration of what Congress intended. At the very least, they should have consulted their own thought processes. Had they done so, they would have realized that if Congress's "paramount purpose" was what they said it was, then Congress would have been better off in achieving such a goal by not enacting the FSIA at all. For under pre-FSIA law, foreign states enjoyed a wide ambit of immunity in American courts. The FSIA, as every lawyer in this field knows, was enacted to *restrict* that immunity.

V.

PETITIONERS' ATTEMPT TO WRAP THEIR CAUSE IN THE AMERICAN FLAG MAY MISREPRESENT THE PRESENT POSITION OF THE UNITED STATES.

The Petitioners assert, without qualification, that the present "position of the United States" (Petition at 8 n.7) is reflected in the Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing in Banc, which the Petitioners reprint as Appendix D to their Petition. If the Petitioners are correct, then why hasn't the United States joined them in their petition for a writ of certiorari? The Respondents understand, upon information and belief, that the Petitioners have in fact asked the Department of State and/or the Department of Justice to support their petition, and were turned down.

The story behind the government's decision to file a Statement of Interest in the Eleventh Circuit is directly relevant to the claim by the Petitioners that the United States supports their cause. Shortly after the decision in the Eleventh Circuit was handed down, the Ambassador from Saudi Arabia wrote to the United States Secretary of State, asking for support in this litigation. (The Petitioners have refused to make a copy of this letter available to this Court; *see* Appendix B.) The Legal Adviser to the State Department answered the letter on March 25, 1991, saying:

> I am writing in response to your letter of March 2 to Secretary Baker requesting that the United States support the Government of the Kingdom of Saudi Arabia in its request for a rehearing before the 11th Circuit in the case of *Nelson v. The Kingdom of Saudi Arabia*. The Department has reviewed the 11th Circuit opinion in this case and is currently considering whether to ask the Department of Justice to file a suggestion of interest requesting rehearing.

See Appendix C. Shortly after this letter was written, the Departments of State and Justice filed their joint Statement of Interest in the Eleventh Circuit.

Immediately thereafter, the Respondents wrote to the Department of Justice and also filed Motions in the Eleventh Circuit pertaining to the intervention by the United States in the lawsuit. The Respondents pointed out the clear inconsistency in the position taken by the United States. On the one hand, the United States was taking the position in its Statement of Interest that the *opinion and judgment* of the Eleventh Circuit, unless reversed, could have negative foreign policy ramifications. (The United States expressly disavowed taking a position on the merits of the case.)[13] On the other hand, in the same letter of March 25, 1991, the Legal Adviser offered the "good offices" of the Department of State to promote a settlement between the parties. The "good offices" of the Department of State is a classic institution in international law, to be accorded the highest diplomatic status as an official representation of the nation. The Legal Adviser stated in his letter:

> We would similarly welcome steps by the parties to resolve this dispute through a negotiated settlement. . . . To this end, the State Department is pleased to offer its good offices to facilitate such discussions.

Since a settlement would leave intact the Eleventh Circuit's opinion, the Respondents asked the Department of

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[13] The United States says in its Statement of Interest: "We nevertheless wish to make clear at the outset that the United States takes *no* position regarding the underlying merits in this case." Petition at 38a.

Justice whether the United States preferred the case to be settled or to be reversed. The Department of Justice firmly replied that the offer of the "good offices" of the State Department to promote a settlement represented official United States policy. As for the other horn of the dilemma—the alleged difficulty in conducting foreign relations with the *Nelson* decision on record—the Department of Justice cited the vacation procedure of *United States v. Munsingwear*, 340 U.S. 36 (1950), saying that even if the parties settled the case the United States could still move the court for vacatur.

The Respondents immediately challenged the applicability of the *Munsingwear* line of cases, pointing out that vacatur is allowed, if at all, to a *party* to a dispute but never to an *amicus*. At any stage in the *Nelson* litigation (including the present petition for a writ of certiorari), a settlement would leave the United States alone, as *amicus*, to ask the court to vacate the judgment. But if that happened, the constitutional requirement of a case or controversy would not be met, because neither party to the litigation would be in court. The government in effect would be asking this Court for an advisory opinion. Clearly this Court would not entertain a motion by an *amicus* to vacate the *Nelson* judgment, even if the *amicus* is the United States.[14]

Accordingly, it is quite clear as a matter of law that the United States cannot claim an objective legal interest in having the *Nelson* case reversed at the same time that

[14] Even apart from the Case or Controversy barrier to vacatur in this case, a judicial opinion is a public act of the government; "[h]istory cannot be rewritten." *Memorial Hospital of Iowa County, Inc. v. United States Dept. of Health & Human Services*, 862 F.2d 1299, 1300 (7th Cir. 1988).

it is sincerely attempting to use the good offices of the Department of State to effectuate a settlement. Why, then, did the government offer to help settle the case and simultaneously file a Statement of Interest in the Eleventh Circuit? The Respondents' best guess is that the offer of the good offices of the Department of State was indeed sincere, while the submission of a Statement of Interest was a short-term political accommodation to the plea of an ally in the recently ended Persian Gulf War.

Now that the Eleventh Circuit has denied rehearing the case, the United States has affirmed to the Respondents its sincere desire to promote a settlement between the parties while apparently rethinking the alleged ramifications of the *Nelson* opinion for foreign policy. The decision by the United States *not* to join in the present petition for a writ of certiorari speaks louder than words that the Department of Justice has acknowledged the clash between its previous Statement of Interest filed in the Eleventh Circuit and the Department of State's offer to use its good offices to facilitate settlement discussions. Thus there is reason to conclude that the "foreign policy" interest asserted by the United States in getting this case reheard in the Eleventh Circuit may have been, at best, a transitory political response to the request by the Kingdom of Saudi Arabia for help in fighting its lawsuits.[15]

[15] There is further reason to believe that the executive branch has rethought its immediate reaction to the Eleventh Circuit's decision. It may have come to believe that the assertion of jurisdiction by an American court over the deliberate torture of an American citizen by a foreign government, when the torture was for doing the job the citizen was hired to do, is consistent with the proper conduct of the foreign policy of the United States and the image that the United States wishes to project to the international community. The United States not only condemns the torture of any

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Although the Petitioners are fully aware of the entire history relating to the submission by the executive branch of its Statement of Interest, they have failed to disclose any of it to this Court. Instead, they boldly assert, utterly out of context, that the present position of the United States is reflected in the Statement of Interest filed in the Eleventh Circuit. By withholding disclosure of the relevant context and circumstances of filing of the government's Statement of Interest, the Petitioners may have attempted to mislead this Court as to their strong claim that the *Nelson* decision embarrasses the executive arm of the government in conducting foreign relations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[15] *continued*
human being anywhere, but also may now have no desire to send a message to foreign governments that if one of their nationals is ever tortured under color of law in the United States for doing the job that an instrumentality of the United States hired him to do, the United States will attempt to evade responsibility by raising a defense of sovereign immunity.

APPENDICES

APPENDIX A

REQUEST FOR ESPOUSAL OF CLAIMS.

April 29, 1991

The Honorable Edwin Williamson
Legal Adviser
United States Department of State
2100 K Street, N.W.
Washington, DC 20037-7180

Re: REQUEST FOR ESPOUSAL OF CLAIMS

Dear Mr. Williamson:

I am writing on behalf of my clients Scott and Vivian Nelson to request espousal of their claims by the United States against the Kingdom of Saudi Arabia.

Their claims are summarized by the Court of Appeals for the Eleventh Circuit in *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), and more particularly in their Complaint contained in the Record Excerpts in that case, copies of which are in the possession of the Department of Justice, c/o Stuart M. Gerson, Esq., and, I believe, in the files of Linda Jacobson, Esq., in your office.

I make this formal request with the clear understanding, as you undoubtedly know better than anyone else in the country, that espousal of the Nelsons' claims is legally irrelevant to their private litigation against Saudi Arabia, King Faisal Specialist Hospital, and Royspec. The espousal of claims on the international level is a government-to-government matter, in which individuals are not parties. Any reparations that you may obtain from the Kingdom

of Saudi Arabia are not necessarily measurable under international law by the actual damages incurred by Scott and Vivian Nelson; rather, they reflect the degree of injury suffered by the United States, perhaps approximated by the actual injuries suffered by the Nelsons. Any monies that may be paid over to the United States as a result of your successful espousal of the Nelsons' claims are not, as a matter of international law, required to be paid to the Nelsons. Whether such monies are actually paid over to the injured parties in nation-to-nation claim espousals is relegated by international law to domestic legislation and practice.

The fact that a government-to-government espousal of the claims of private citizens has no legal relevance to private litigation of the type that the Nelsons are currently pursuing, is in the interest of both parties. The Nelsons will not be legally disadvantaged in their private litigation if, despite your best efforts, you are unable to obtain redress on the diplomatic front from the Kingdom of Saudi Arabia. Similarly, if Saudi Arabia responds to your diplomatic efforts by paying damages to the United States, that fact will have no negative legal implication respecting Saudi Arabia's defenses to the Nelsons' claims in the private litigation.

To be sure, if damages are obtained as the result of your successful espousal of the Nelsons' claims, I will stipulate as follows: Any monies recovered by the United States and actually paid over to the Nelsons will be deducted from the amounts, if any, that the Nelsons may obtain against Saudi Arabia, King Faisal Specialist Hospital, and/or Royspec, by virtue either of a settlement entered into between the parties (whether or not facilitated by your good offices) or by virtue of successful prosecution of the Nelsons' claims upon remand to the federal district court.

As far as the Nelsons' continued pursuit of their claims against Saudi Arabia in American courts is concerned, you have already taken the position that American courts are an inappropriate forum. You are urging the Court of Appeals to reverse its decision in the Nelson Case. In light of your clear position on this question, the Department of State surely cannot delay its decision to espouse the Nelsons' claims on the ground that there is pending litigation in a forum which it regards as inappropriate. Moreover, American courts are not "local remedies" under international law with respect to the principle of exhaustion of local remedies, even though under the Foreign Sovereign Immunities Act the Nelsons are clearly entitled to remedies in a private commercial litigation against a non-immune sovereign defendant. Finally, the United States is not party to the case of *Nelson v. Saudi Arabia* in American courts. Indeed, it is my opinion that the Executive Branch of the United States lacks even a colorable "interest" in that litigation.

The Department of State was made aware of the Nelsons' claims in October, 1984. Considering the number of years that have elapsed, the Department of State has had ample time to assess the Nelsons' claims. May I remind you that you mentioned the possibility that the Department of State may espouse the Nelsons' claims, depending on the resolution of the question of exhaustion of local remedies, in your letter of March 25, 1991, to His Excellency Bandar bin Sultan, Ambassador of the Kingdom of Saudi Arabia.

Please permit me to summarize the requests of Mr. and Mrs. Nelson to the espousal of their claims by the United States, and to comment on the question of the exhaustion of local remedies in each instance. I make the following remarks to some extent on the basis of information con-

veyed to me by Mr. and Mrs. Nelson, but without detailed study of the voluminous records, memos, and tape recordings currently in their possession. If necessary, I will make such a study. I would expect, however, that the general points that I shall make will accord with the information in your own files. In any event, I make the following representations in good faith, subject to corroboration and correction, if necessary, by the documentary evidence.

I. THE CLAIMS OF VIVIAN NELSON.

Vivian Nelson's claims are summarized by the Eleventh Circuit, 923 F.2d at 1530. Her claims are detailed in the Complaint to which I referred earlier. While separate and distinct from her husband's claims, Mrs. Nelson's claims arise from similar underlying facts and are inextricably intertwined with the claims of her husband.

On the question of Mrs. Nelson's exhaustion of local remedies, I quote from my recently filed motion to exclude your Statement of Interest in *Nelson v. Saudi Arabia:*

> Vivian Nelson is a co-Appellant in the present case. Her claim is inseparable from that of her husband. The Department of State must be charged with awareness that there is no "appropriate forum" in Saudi Arabia for Mrs. Nelson because she would be deprived of elementary due process of law in any Saudi court. A woman's testimony in a Saudi court is valued at only one-half that of a man's testimony. See Department of State, *Country Reports on Human Rights Practices for 1989* at 1557 (legal practices in Saudi courts)..

If Mrs. Nelson were to seek private redress in a Saudi court against the man who told her that he would sponsor her husband's release from prison in return for sexual favors, what chance would she have of prevailing in her

claim against him when his testimony is accorded, by Saudi law and practice, double the value of her testimony?

As you know, the Department of State and the Department of Justice filed a Statement in opposition to my motion, taking issue with all of the points I raised except the point about Mrs. Nelson. Your brief is conspicuously and glaringly silent about Mrs. Nelson's claim. Its silence leaves an uncomfortable gap in the Court of Appeals' ability to evaluate the statement your Department made that the Department retains the option of espousing the plaintiffs' claims against Saudi Arabia pending the resolution of the question of exhaustion of local remedies. And it leaves co-plaintiff Mrs. Nelson in the dark as well.

I am confident that the Department of State would agree with me that Mrs. Nelson does not deserve to be treated as a non-person. I am sure that the Department of State will appreciate that her claim, recognized by the Eleventh Circuit in its opinion of February 21, 1991, is as worthy of consideration on the diplomatic level by the government of the United States as is her husband's claim.

In short, I believe that Vivian Nelson, a law-abiding citizen of the United States, is entitled to a yes or no answer to the following question: Does the Department of State insist that Vivian Nelson must first exhaust local remedies in a foreign court system that values her testimony at one-half that of a man's testimony before it will undertake to espouse her claim against the Kingdom of Saudi Arabia?

I would appreciate your letting me know your answer so that I can communicate it to Mrs. Nelson.

I would very much hope that your answer to the question will be in the negative, and that you will undertake

forthwith to espouse Mrs. Nelson's claims against Saudi Arabia. In light of the six and a half years that have passed, the full and continuing notice that the Department of State has been given about the Nelsons' claims, the exhaustion of the Nelson's family assets, and their plunge into extreme indebtedness to cover Mr. Nelson's hospital bills, any further delay just for the sake of delay would surely be regrettable.

II. THE CLAIMS OF SCOTT NELSON.

Scott Nelson's claims, like those of his wife, are summarized in the opinion of the Court of Appeals for the Eleventh Circuit and detailed in his Complaint filed with the district court and incorporated in the Record Excerpts filed with the Court of Appeals.

The Department of State has been aware of his claims ever since he was released from a Saudi prison in 1984 through the intervention of Senator Kennedy. Mr. Nelson has consistently and persistently petitioned your Department for its help and assistance in obtaining redress from the Kingdom of Saudi Arabia.

Upon his return to the United States in 1984, Mr. Nelson obtained from the Department of State a list of seventeen Saudi lawyers or law firms who might pursue his claim in Saudi courts. He wrote to each of them. Five responded by telephone, declining his case. Three responded by letter, declining his case. The others did not respond.

Any attempt by Mr. Nelson to pursue his claims in a Saudi court would be heavily dependent upon the existence of substantial documentary evidence. Many original documents, memos, telegrams, official papers, and other evidence were compiled and stored in the United States

Embassy in Riyadh, Saudi Arabia. However, in 1987, that Embassy destroyed Mr. Nelson's entire file. In your Department's opposition to my Motion filed with the Eleventh Circuit, you have claimed that the Riyadh documents "were destroyed pursuant to routine embassy security procedures," and added that the State Department "has maintained files on the Nelson matter in its facilities in Washington, D.C." It would appear, however, that if the Department cared about helping Mr. Nelson it would have prevented the occurrence of the purported "routine procedures." Moreover, the files that have been "maintained" in Washington D.C. do not contain copies of the original evidence that was destroyed in Riyadh. It is quite evident that Mr. Nelson's ability to pursue local remedies in Saudi courts has been substantially impaired by the deliberate destruction of his files.

Several years later, your Department again urged Mr. Nelson to get a Saudi lawyer to prosecute his claims. The Department presented to Mr. Nelson a list of seventeen attorneys to contact who might help him in Saudi courts. According to Mr. Nelson, the list was identical to the list that had been given to him years earlier. Nevertheless, he wrote again to each of the attorneys on the list. He obtained the same negative results. All that was accomplished was a further deterioration of his financial assets and human spirit. One attorney Mr. Scott contacted, Haig V. Kalbian, wrote directly to Mr. John Knox of the International Claims section of your Department, on April 6, 1989. Mr. Kalbian said, "No Saudi attorney that I am aware of would jeopardize his practice, and some would argue his life to take on such a case."

Quite apart from the question of exhaustion of local remedies is the issue of whether Mr. Nelson in fact was tortured. In your Statement of Interest filed with the

Court of Appeals, there is a statement on page 4 that "The record reveals, however, that there is sharp disagreement regarding the facts underlying plaintiffs' claims." Then after referring to the issue of exhausting local remedies, the Statement of Interest goes on to say, "the United States retains the option of espousing plaintiffs' claims against Saudi Arabia—if it finds them to have merit—as an official matter between the two governments" (at p. 5). The juxtaposition of these two sentences gives rise to the clear inference that your Department is skeptical about whether Mr. Nelson was in fact tortured.

I am at a loss to imagine where that skepticism comes from, since Mr. Nelson has consistently provided you with copies of medical records and reports detailing his medical evaluations and treatments. If your Department has failed to read those reports, then it should not have communicated to the Court of Appeals, even by inference, its skepticism about the merits of Mr. Nelson's claims. Such a communication can be highly prejudicial to the rights of one party in an entirely private litigation. The Court of Appeals might naturally assume that your Department, after six and a half years of persistent appeals for help by Mr. Nelson, would only write the two sentences above quoted, with their skeptical implication, if the Department had some evidence in its possession upon which to base its skepticism. On the other hand, if it was not your intention to convey to the Court of Appeals the suggestion that after six and a half years you have reason to be skeptical about the merits of Mr. Nelson's claims, then I respectfully suggest that you might consider removing the prejudicial impact of that implication by a letter addressed to the Court.

There can be no real question that Mr. Nelson was in fact tortured. The proof is incontrovertible. You have most

of it in your possession. Please allow me to recapitulate the main points.

Let us first consider whether there is any medical evidence that Mr. Nelson was *not* tortured. I have asked this question of the attorneys for the Kingdom of Saudi Arabia. They have provided me with the sole document upon which they rest their entire case that Mr. Nelson was not tortured. It is a 7-page report by Ledford Gregory, a doctor hired by Hospital Corporation of America in connection with the case of *Nelson v. Hospital Corp. of America*. Dr. Gregory examined Scott Nelson on January 27, 1990. Mr. Nelson says that the examination lasted fifteen minutes. Dr. Gregory reviewed some of Mr. Nelson's medical records, noting that there were many critical records that he had not read. He reported that there had been arthroscopic procedures in the internal knee joints. Dr. Gregory suggested that Mr. Nelson's pain is exaggerated, but he did not conclude that Mr. Nelson had not been tortured.

In contrast, Mr. Nelson has been examined by at least nine doctors, has undergone invasive reconstitutive knee surgery three times, and is presently diagnosed as requiring additional knee surgery. Mr. Nelson has provided you with the depositions of two doctors who have thoroughly examined him over a period of time. Dr. Dan R. Chartier, a psychologist and psychophysiologist in North Carolina and a clinical assistant professor in the School of Medicine at the University of North Carolina in Chapel Hill, in a 112-page deposition, found that Mr. Nelson experienced post-traumatic stress syndrome such as that of some Vietnam war veterans. This was measured by muscular contractions in terms of microvolt readings, and galvanic skin responses measured in micromode conductance. Dr. Alan Spanos, a physician specializing in the management

of chronic pain, graduated from Oxford University and has taught and done research at Duke Medical Center. In his 121-page deposition, he testified that Mr. Nelson has a diffuse nerve injury causing his brain to receive messages of intense pain. He stated that his findings were consistent with the process of torture that Mr. Nelson described. Dr. Spanos said that Mr. Nelson's injuries were unlikely to have been caused by a car accident or a sports injury, because those injuries produce localized, and not diffuse, conditions. Mr. Nelson had gross derangements in the knees, according to Dr. Spanos. In sports injuries, there would be signs of the knee being forcefully struck from the side. In Mr. Nelson's case, however, the internal "clockwork" of the knees was deranged without external evidence of trauma. His injuries would be consistent with a pulling injury to the knee which would not do much damage to the outside structures but which could damage the internal structures. Mr. Nelson had a partially torn lateral meniscus, a partially torn anterior cruciate ligament and chronic synovitis (internal inflammation). Dr. Spanos observed that these injuries were partially corrected by invasive reconstitutive surgery.

Most importantly, there are two wholly objective evaluations—one medical, the other legal—that furnish as convincing a proof of Mr. Nelson's torture as could be furnished for anyone's torture. The first is a report, a copy of which Mr. Nelson sent to your Department, of the Center for Victims of Torture, a Minneapolis non-profit corporation. Mr. Nelson was thoroughly evaluated by the Center in April, 1990. I would like to quote for you the summary report of Dr. Barbara Chester:

> Scott Nelson was initially seen at the Center For Victims of Torture on April 9, 1990. In addition to an initial screening and intake interview conducted

by the Center's clinical director (Barbara Chester, Ph.D. LCP), Mr. Nelson completed the Center's entire evaluation procedure which consists of a medical assessment (Neal Holtan M.D.), psychiatric assessment (James Jaranson, M.D.), and psychological testing (Rosa Garcia Pel oniemi, Ph.D. LCP). Mr. Nelson was seen at the Center on Monday, April 9th for intake, screening, and psychiatric assessment, Tuesday, April 10th and Thursday April 12th for psychological testing and interpretation, and Friday, April 13th for medical assessment and a final information session.

The Center For Victims of Torture relies upon the definition of torture developed by the World Medical Association as a guideline for eligibility of prospective clients. According to this definition, which involves the deliberate and systematic infliction of physical and/or mental suffering, Mr. Nelson is qualified to receive services at this Center.

Mr. Nelson's evaluation and interview responses are consistent with his reported history of detention and torture in Saudi Arabia in 1984, and quite similar to the responses and reactions reported by other clients. Mr. Nelson was diagnosed as suffering from Post-traumatic Stress Disorder (delayed) (309.89), and Major Depression (296.2), according to the criteria specified in the Diagnostic and Statistical Manual, Third Edition-Revised, of the American Psychiatric Association (DSM-111-R). These symptoms include severely disturbed sleep pattern, nightmares, unwanted and intrusive recollections of his experience, exaggerated startle response, and difficulty concentrating. The client also describes symptoms of anxiety including discrete panic episodes, including rapid heart rate, sweating, and chest heaviness, most frequently occurring after nightmares. The environmental stressors contributing to these disorders were rated as "catastrophic" according to the same DSM-111-R guidelines.

> Mr. Nelson appears to be an intelligent, open and direct person. Although he is well oriented to reality, his symptoms are not likely to improve significantly without appropriate intervention.

There is one other report that I want to call to your attention, because it is the only one that Mr. Nelson has not sent in to your Department. It is the decision of Administrative Law Judge David P. Tennant, dated September 14, 1990, of the Office of Hearings and Appeals of the United States Social Security Administration, Department of Health and Human Services. A full copy of Judge Tennant's decision is appended to this letter.

Judge Tennant held that Scott J. Nelson, claimant, met the disability insured status requirements of the Social Security Act beginning on September 27, 1984, the day he claimed he was tortured. Moreover, the severity of his impairments met the requirements of §§ 12.04, 12.06, and 12.07, Appendix I, Subpart P, Regulations No. 4 of the Act, and has precluded Mr. Nelson from working for at least 12 continuous months (20 CFR 404.1525).

As you are aware, Administrative Law judges in the Department of Health and Human Services must pass upon many disability claims, and a number of them are spurious. Those judges are uniquely qualified by virtue of their specialized experience to evaluate the sincerity of disability claimants. I would like to quote some pertinent sections of Judge Tennant's decision:

> The Administrative Law Judge further finds that the claimant has impairments including chronic low back pain with pain in the lower extremities, an affective disorder, and anxiety related disorder, and a somatoform disorder. The claimant's impairments, in combination, are "severe" because they limit the claimant in his ability to sit, stand, walk, lift and carry,

> maintain the activities of daily living, maintain social functioning, maintain concentration, persistence, and pace, and avoid deterioration or decompensation in work or work-like settings. . . .
>
> The evidence establishes that the claimant was hospitalized initially in November 1984 for treatment of pain in the left knee. At that time, he was diagnosed as having an internal derangement of the left knee with a partially torn lateral meniscus and a partially torn anterior cruciate ligament. During the hospitalization, an arthroscopy with a partial meniscectomy and partial resection of the cruciate ligament with a partial synovectomy was performed to the left knee. The claimant then received emergency treatment in November 1986 for complaints of chest pain, although an electrocardiogram was normal (Exhibits 14 and 15). . . . An arthrogram of the right knee later that month [August 1986] showed a tear of the medial meniscus. An arthroscopy with a partial meniscectomy and a partial synovectomy was performed to the right knee in September 1986. . . .
>
> The evidence shows that since the alleged onset date of disability the claimant has had a disturbance of mood accompanied by anhedonia, appetite disturbance with change in weight, sleep disturbance, psychomotor agitation, decreased energy, feelings of guilt and worthlessness, difficulty concentrating and thinking, and thoughts of suicide as required by section 12.04; anxiety with generalized persistent anxiety accompanied by autonomic hyperactivity and apprehensive expectation, a persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation, recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror, and sense of impending doom occurring on the average of at least once a week, recurrent obsessions or compulsions which are a source of marked distress, and recurrent and intrusive recollec-

tions of a traumatic experience which are a source of marked distress as required by section 12.06; and physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms as evidenced by unrealistic interpretations of physical signs or sensations associated with the preoccupation or belief that the claimant has a serious disease or injury as required by section 12.07. . . . [T]he Administrative Law Judge finds that the claimant's mental impairments, in combination, produce a marked restriction in the activities of daily living, marked difficulties in maintaining social functioning, frequently occurring deficiencies of concentration, persistence, or pace, and repeated episodes of deterioration or decompensation in work or work-like settings. According to the testimony of the claimant's wife and according to his own testimony, his daily activities are extremely limited and she must assist him with dressing and bathing. In addition, although the claimant was quite active socially prior to his arrest and torture, he engages in few social activities at the present and does not even participate in social activities with his wife and son. He has diminished concentration as documented by his treating mental health professionals and he has had repeated episodes of deterioration or decompensation in work or work-like settings. Therefore, the Administrative Law Judge finds that the claimant's impairments are of a severity to meet the requirements of sections 12.04, 12.06, and 12.07. . . .

To all this evidence I wish to add an observation of my own. It concerns a piece of evidence that is conspicuous because it is missing—like the famous Sherlock Holmes story about the hound that did not bark in the night.

The Nelsons took up their new home in Riyadh, Saudi Arabia, in 1983 with their infant son Matthew. Like many American families—like my own family, in fact—the Nelsons wanted two children. But a brutal, inhuman torturing

of Mr. Nelson intervened. The Nelsons never had a second child. The neurological explanation can be left to the imagination. The fact is that the absence of that second child in the Nelson family speaks louder than all the self-serving allegations in the world challenging his claim of torture.

For the foregoing reasons, I ask the United States to espouse the claims of Scott and Vivian Nelson with the Kingdom of Saudi Arabia. In your diplomatic representations to the Kingdom, you may wish to point out that some members of the Royal Family were among the patients at the King Faisal Specialist Hospital when Mr. Nelson reported the existence of dangerous grease valves in the patients' oxygen supply lines. For his service to them and to all the patients in the hospital, he deserved a medal of commendation. Instead, he was tortured. By universally acknowledged standards of justice and fairness, the Kingdom of Saudi Arabia should generously compensate the United States for the injuries sustained by Mr. and Mrs. Nelson, and in addition to financial compensation—which cannot hope to make up for deliberate torture—should express its regrets to the United States of America for the behavior of those persons who, acting under color of law in Saudi Arabia, so shockingly violated Scott and Vivian's fundamental human rights.

Sincerely,

Anthony D'Amato
Counsel for Scott and
Vivian Nelson[16]

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[16] As of the date this Brief in Opposition is filed in the Supreme Court, the Department of State has responded only that the foregoing Request for Espousal of Claims is under review.

APPENDIX B

LETTER OF MARCH 2, 1991, FROM HIS EXCELLENCY BANDAR BIN SULTAN TO THE HONORABLE JAMES A. BAKER III.

[*The Department of State notified the Respondents that it would make this letter available to the Respondents, providing that the attorneys for Saudi Arabia agreed. The Respondents thereupon made four separate written requests to the attorneys for Saudi Arabia, stating in the most recent request that the letter would be reprinted in the appendix to this Brief. However, the attorneys for Saudi Arabia have refused to provide a copy of the letter.*]

APPENDIX C

LETTER OF MARCH 25, 1991, FROM THE HONORABLE EDWIN D. WILLIAMSON, THE LEGAL ADVISER, TO HIS EXCELLENCY BANDAR BIN SULTAN, AMBASSADOR FROM THE KINGDOM OF SAUDI ARABIA.

March 25, 1991

Dear Mr. Ambassador:

I am writing in response to your letter of March 2 to Secretary Baker requesting that the United States support the Government of the Kingdom of Saudi Arabia in its request for a rehearing before the 11th Circuit in the case of *Nelson v. The Kingdom of Saudi Arabia*. The Department has reviewed the 11th Circuit opinion in this case and is currently considering whether to ask the Department of Justice to file a suggestion of interest requesting rehearing. In making our decision, the Department will give careful consideration to the arguments raised by the Kingdom of Saudi Arabia concerning interpretation of sovereign immunity, as expressed in your letter.

Regardless of the ultimate decision of the United States Government on whether to express any views in the litigation currently pending before the 11th Circuit, the Department, which has taken no position on the merits of Mr. Nelson's claim, has long been of the view that it would be appropriate for Mr. Nelson to resolve his dispute either through the Saudi legal system or through a negotiated settlement. Regrettably, however, there has been very little progress to date along either of these avenues.

As for litigation in Saudi Arabia, we have consistently told Mr. Nelson that the Department of State may not, under international law, espouse the claim of a U.S. citizen against a government of a foreign state unless the citizen has exhausted all local remedies available in that state or shown that recourse to local remedies would be futile. Accordingly, we have encouraged Mr. Nelson to present his claim to the Saudi Board of Grievances, which we understand to be the appropriate forum in Saudi Arabia for adjudication of this dispute. Mr. Nelson contends, however, that he has been unable to find a qualified lawyer who is willing to take his case. As a result, Mr. Nelson attempted on November 3, 1990, to have the Board of Grievances adjudicate his case solely on the basis of documentary materials. Citing Mr. Nelson's failure to appear, either personally or through a representative, the Board dismissed the case. Although the Department has not yet taken a position on whether, under the circumstances, Mr. Nelson can be deemed to have exhausted available local remedies, we are concerned about the apparent difficulty he has faced in securing a legal representative in Saudi Arabia. We would welcome any ideas your government may have on how we might assist Mr. Nelson in this regard.

We would similarly welcome steps by the parties to resolve this dispute through a negotiated settlement. Mr. Nelson has informed the Department that he is willing to meet with officials of the Government of Saudi Arabia, either in the United States or in a mutually agreeable third country, to discuss possible settlement of his case. We are unaware, however, of any serious settlement discussions to date. Mr. Nelson has stated what while he did meet with a lawyer retained by the Saudi Embassy in 1987, this was to formulate his claim for presentation

in Saudi Arabia, not to discuss settlement. Particularly in light of the difficulties Mr. Nelson has faced in bringing his claim in Saudi Arabia, we think it would prove beneficial for the parties to sit down together to review the claims and evidence and to exchange views. To this end, the State Department is pleased to offer its good offices to facilitate such discussions.

Sincerely yours,
Edwin D. Williamson

Supreme Court, U.S.
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No. 91-522

IN THE

Supreme Court of the United States

October Term, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In their opposition to the Petition for a Writ of Certiorari, Respondents raise two novel arguments.[1] First, they contend that their case against Saudi Arabia, alleging unlawful arrest, imprisonment, and torture, does not involve the exercise of the police power.[2] Second, they contend that the United States deliberately misrepresented its view of this case to the Eleventh Circuit as a political favor to Saudi

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[1]For the statement required under Rule 29.1 of the Rules of this Court, see the Petition for a Writ of Certiorari at 1 n.1.

[2]Respondents also contend, for the first time, that "an element of [Respondent Nelson's] cause of action is the employment contract he signed in the United States." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 7. Respondents apparently misconstrue the meaning of the term "element". Neither the district court nor the court of appeals found that the employment contract was an element of any of Respondents' causes of action.

Arabia.[3] Both contentions are incorrect. More importantly, both contentions only underscore the need for this Court to issue a writ of certiorari in this case.

I. RESPONDENTS' CONTENTION THAT THIS CASE DOES NOT IMPLICATE THE EXERCISE OF POLICE POWER BY A FOREIGN STATE IS FRIVOLOUS

Respondents contend that this case does not present the question whether United States courts can exercise jurisdiction over claims arising from the exercise of the police power by a foreign state in its own territory. According to Respondents, "[n]either side ever alleged any facts pertaining to the 'exercise of police power'." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 2 [hereinafter Opposition Brief]. Respondents also contend that discovery is necessary to determine whether this case actually implicates Saudi Arabia's exercise of police power. *Id.* Both contentions are meritless.

A. Respondents Specifically Allege an Abuse of the Police Power by Saudi Arabia

Respondents' Complaint alone belies their contention that "[n]either side ever alleged any facts pertaining to 'exercise

[3]Respondents also contend that this case does not create a conflict among the circuits but instead is a "wholly unremarkable part of th[e] consistent federal jurisprudence" interpreting the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1988), as applied to extraterritorial torts. Opposition Brief at 13. Respondents incorrectly portray the Eleventh Circuit's precedent-setting decision. One commentator has written, "With respect to claims relating to arrest and detention, the *Nelson* opinion is notable in that it permits the assertion of jurisdiction against a foreign state regarding the exercise of its police powers." Vega, *Nelson v. Saudi Arabia*, 85 Am. J. Int'l Law 557, 558 (1991) (footnote omitted).

of police power'."[4] Opposition Brief at 2. Indeed, the Complaint turns on frequent allegations of improper exercise of the police power. The first substantive allegation in the Complaint states that Scott Nelson was taken to a "jail cell" and "beaten by agents or employees of Saudi Arabia; *acting in their official capacity.*" Complaint at ¶ 11 (emphasis added). It then alleges that during his captivity, Respondent "was repeatedly interrogated, in Arabic, by *police investigators.*" *Id.* at ¶ 12 (emphasis added). Count II alleges battery by Saudi Arabia, "through its agents or employees, *acting in their official capacity.*" *Id.* at ¶ 18 (emphasis added). Count IV of the Complaint alleges "Wrongful Arrest and Imprisonment". *Id.* at 6. Count V apparently alleges a breach of the United Nations Code of Conduct for *Law Enforcement Officials*. *Id.* at ¶ 26 (emphasis added). Finally, Respondents' claim of negligent failure to warn alleges that Saudi Arabia "knew or should have known that officials of the Saudi government . . . have, and sometime exercise, the power to have persons summarily arrested." *Id.* at ¶ 15. Each of these allegations starkly contradicts Respondents' contention that the exercise of the police power is not in the record.

In addition, sworn affidavits of Respondents Scott and Vivian Nelson alleging the improper exercise of police power were submitted to the district court in support of Petitioners'

[4]Respondent's assert that "the only document in the case is the Respondents' Complaint filed in district court." Opposition Brief at 1-2. While the Complaint alone is sufficient, this assertion misrepresents the record in this case, which includes numerous pleadings filed before the district court by both parties. Respondents also miss the irony of their discussion of the record when Respondents' entire Argument V (relating to the United States' position) relies upon materials not in the record.

motion to dismiss.[5] In her affidavit, Respondent Vivian Nelson alleged that Respondent Scott Nelson "was arrested and jailed in Riyadh, Saudi Arabia without charges or explanation." Affidavit of Vivian Nelson at 1 (Oct. 27, 1986), ***reprinted in Hearing, supra*** note 5, at 24. Respondent Scott Nelson alleged in his affidavit that he "was . . . taken to the Criminal Investigation Division (C.I.D.)." Affidavit of Scott J. Nelson at 2 (Nov. 18, 1986), ***reprinted in Hearing, supra*** note 5, at 26. After referring several times to "my arrest", Respondent Scott Nelson then stated that he "was transported to Al Sijan Prison to await trial on unknown charges." *Id.* at 3, ***Hearing, supra*** note 5, at 27. Respondents' own sworn statements, therefore, implicate Saudi Arabia's exercise of the police power in this case.

Even in the Opposition to Petition for Writ of Certiorari, Respondents contradict their assertion that the exercise of the police power is not at issue in this case. In summarizing the findings of the Eleventh Circuit, based on the allegations of the Complaint, Respondents state that Respondent Scott Nelson's " 'blowing the whistle' embarrassed his superiors at King Faisal Specialist Hospital, who procured his physical torture at the hands of *government agents or officials acting* contrary to law but ***under color of law***." Opposition Brief at 7 (emphasis added).

This case rests entirely upon Respondents' allegations that Saudi officials abused the police power. The record belies Respondents' contention that there is no issue of the exercise of police power. Indeed, it leads only to the opposite

[5]Respondents originally submitted these affidavits as prepared statements for a congressional hearing. *See Problems Confronting American Businessmen in Saudi Arabia: Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 24-29 (1987) [hereinafter *Hearing*].

conclusion, that the power of United States courts to assert jurisdiction over claims arising from the exercise of the police power by a foreign state in its own territory is the central issue in this case.

B. No Discovery Is Necessary Before a Final Adjudication of Petitioners' Claim of Immunity

Respondents contend that Petitioners' claim of foreign sovereign immunity cannot be finally adjudicated until after Petitioners have "discharged the burden" of participating in discovery and of raising the immunity defense in an answer to the Complaint. Opposition Brief at 2. This contention flies in the face of the Federal Rules of Civil Procedure and ignores the decisions of this Court and of several Courts of Appeal. Consequently, it does not even warrant consideration by this Court.

Federal Rule of Civil Procedure 12(b) explicitly permits a defendant to raise the defense of lack of subject-matter jurisdiction before serving a responsive pleading. Fed. R. Civ. P. 12(b); *Blackmar v. Guerre*, 342 U.S. 512, 514 (1952) (defendant "properly presented" defense of lack of jurisdiction first in a motion to dismiss and then, after the motion was overruled, as a defense in the answer). Without citing any authority, Respondents assert that Petitioners must raise this defense in an answer. Opposition Brief at 2. No court anywhere has ever so held, and the Federal Rules of Civil Procedure impose no such burden. This argument should be summarily rejected.

Respondents also contend, again without citing any authority, that before raising the defense of foreign sovereign immunity, Petitioners must participate in discovery. *Id.* The collateral order doctrine, however, as this Court has held, permits

review of interlocutory orders denying claims of immunity because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *cf. Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("[t]he immunity question is a pure issue of law, appropriate for our immediate resolution").

Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) is the seminal case extending the collateral order doctrine to an interlocutory order denying a claim of foreign sovereign immunity. The *Segni* court held that a "foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity." *Id.* at 347. Similarly, the court in *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989), concluded that claims of foreign sovereign immunity fall within the collateral order exception because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." Five other circuits have reached the same conclusion. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990), and cases cited therein. The collateral order doctrine, therefore, confers jurisdiction on this Court to review the Eleventh Circuit's denial of Petitioners' motion to dismiss for lack of subject-matter jurisdiction before Petitioners have participated in any discovery.

In sum, this Court should reject both of Respondents' contentions. First, the collateral order doctrine, as promulgated by this Court and interpreted by numerous Courts of Appeal, does not require a party claiming immunity to participate in

discovery before a final adjudication of an immunity claim. Second, issues relating to the exercise of the police power are squarely in the record. Respondents themselves raised them in the Complaint. Their eleventh-hour attempt to disassociate themselves from the allegations of the Complaint must fail.

II. RESPONDENTS' CONTENTION THAT THE UNITED STATES HAS PURPOSEFULLY MISREPRESENTED ITS POSITION BEFORE THE ELEVENTH CIRCUIT FURTHER ILLUSTRATES THE NEED FOR REVIEW

Respondents accuse Petitioners of misrepresenting the present position of the United States in this case. To support this accusation, they cite the United States' failure to "join"[6] the Petition for a Writ of Certiorari. Opposition Brief at 14. They also assert that the position of the United States in its Statement of Interest "was a short-term political accommodation" to Saudi Arabia. *Id.* at 17. In essence, Respondents suggest that the United States purposefully misrepresented its position before the Eleventh Circuit as a political favor to Saudi Arabia. Respondents then conclude that as a result, this case implicates only "transitory" foreign policy interests. *Id.* Respondents' contentions are without support. Indeed, these arguments only reinforce Petitioners' assertion that this case implicates important foreign policy issues.

A. The United States Did Not Misrepresent Its Position to the Eleventh Circuit

Respondents contend that the Statement of Interest filed by the United States in the Eleventh Circuit does not express the position of the United States in this case. They reason

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[6]Respondents apparently ignore Rule 12.2 of this Court which permits only parties to join in a petition for a writ of certiorari.

that "the United States cannot claim an objective legal interest in having the *Nelson* case reversed at the same time that it is sincerely attempting to use the good offices of the Department of State to effectuate a settlement." *Id.* at 16-17. The position of the United States in the Statement of Interest, however, is perfectly consistent with its support for a resolution of this case outside of United States courts.

Although the United States contended in its Statement of Interest that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-1611 (1988), prohibits United States courts from adjudicating Respondents' claims, it did not contend that Respondents must go without a remedy if their claims prove meritorious. Indeed, the United States informed the Eleventh Circuit that "[w]e have attempted to assure that the plaintiffs will have an appropriate forum in which to present their claims." Petition for a Writ of Certiorari at 38a. The actions of the United States, therefore, are unified by a single principle that has been Petitioners' position throughout this litigation: United States courts are not the appropriate forum for resolving claims arising from the public acts of a foreign state. By offering diplomatic channels to discuss this dispute, the United States has acted consistently with its position before the Eleventh Circuit.

B. Respondents' Opposition Demonstrates That This Case Implicates Important Foreign Policy Issues

Respondents attempt to minimize the foreign policy interest of the United States in this case by characterizing it as "a transitory political response to the request by the Kingdom of Saudi Arabia for help in fighting its lawsuits." Opposition Brief at 17 (footnote omitted). To support this characterization, Respondents refer to diplomatic correspondence between the

Kindgom of Saudi Arabia and the United States government shortly before the filing of the Statement of Interest. Respondents submit a portion of this correspondence[7] in their Appendix.[8] Contrary to Respondents' assertion, this correspondence demonstrates the important foreign policy implications for the United States of this case.

Respondents rely on only two epistles in contending that this case involves only "transitory" foreign policy interests: first, a letter from the Royal Ambassador of the Kingdom of Saudi Arabia to the United States Secretary of State, which Respondents have never seen; and second, a response from the Legal Adviser of the State Department to the Royal Ambassador. This correspondence between officials at the highest level of the Saudi and United States governments illustrates that this case has substantial import for the foreign relations of the United States. Indeed, Respondents admit as much by citing the Legal Adviser's offer in his response of "the 'good offices' of the Department of State to promote a settlement between the parties." *Id.* at 15. As Respondents explain, "[t]he 'good offices' of the Department of State is a classic institution in international law, to be accorded *the*

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[7]Respondents insinuate that Petitioner Saudi Arabia has acted improperly by refusing to disclose a letter from the Royal Ambassador of the Kingdom of Saudi Arabia to the United States Secretary of State. International convention, however, establishes the inviolability of the official correspondence of diplomatic missions, regardless of a foreign state's immunity from suit in United States courts. *See* Vienna Convention on Diplomatic Relations, *opened for signature* April 18, 1961, art. XXVII, 29 U.S.T. 3229, 3239, T.I.A.S. No. 7502 (ratification by U.S. submitted to U.N. Secretary General Nov. 13, 1972) (guaranteeing the inviolability of official correspondence relating to the functioning of foreign missions).

[8]None of the materials submitted to this Court in the Appendix was part of the record before the district court. Respondents submitted these materials to the Eleventh Circuit only after Petitioners filed their Petition for Rehearing and Suggestion of Rehearing En Banc.

highest diplomatic status as an official representation of the nation." *Id.* (emphasis added).

In sum, Respondents' own submissions to this Court include correspondence at the highest level of the United States government concerning this case and an offer of a forum for settlement "to be accorded the highest diplomatic status". Despite Respondents' attempt to minimize the foreign policy implications of this case, their own submissions demonstrate that, as the United States said in its Statement of Interest, this case implicates significant foreign policy concerns of the United States and, therefore, merits review by this Court.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, ET AL., PETITIONERS

v.

SCOTT NELSON AND VIVIAN NELSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit by a United States citizen against a foreign state alleging that the foreign state recruited him in this country for overseas employment and then imprisoned and tortured him on account of his employment-related activity in the foreign state.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners Kingdom of Saudi Arabia, King Faisal Specialist Hospital (a Saudi-owned health care facility), and Royspec (a Saudi-owned purchasing agency), seek review of a court of appeals judgment holding that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1603 *et seq.*, confers jurisdiction over a lawsuit filed by respondents Scott and Vivian Nelson. The Nelsons, who are American citizens, filed an action in the United States District Court for the Southern District of Florida seeking damages resulting from the Saudi government's

arrest and alleged mistreatment of Scott Nelson in 1984, while he was employed by the King Faisal Specialist Hospital in Saudi Arabia. The district court dismissed the Nelsons' suit, rejecting their contention that the FSIA confers subject matter jurisdiction to adjudicate the dispute. Pet. App. 18a-25a. The court of appeals reversed, holding that the FSIA confers jurisdiction because the Nelsons' suit is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). Pet. App. 1a-17a.

1. The FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 443 (1989). Enacted in 1976, the FSIA provides the courts with objective criteria to determine whether suits against foreign states shall proceed. The FSIA replaces the prior ad hoc approach in which the courts deferred to what was sometimes perceived as the Executive Branch's desires based on foreign policy objectives rather than legal principles. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-488 (1983).

The FSIA gives the United States district courts original subject matter jurisdiction over nonjury civil actions against a foreign state, including suits by foreign plaintiffs, as to claims for relief with respect to which the foreign state is not entitled to immunity under Sections 1605 through 1607 of the FSIA (28 U.S.C. 1605-1607). 28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489. The FSIA further provides that the district court shall have personal jurisdiction over the foreign state as to those claims in which service of process has been made in accordance with the FSIA. 28 U.S.C. 1330(b).

The crucial inquiry is the scope of the foreign state's immunity. Section 1604 of the FSIA states the general rule:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. Sections 1605 through 1607 provide exceptions to that general rule that essentially codify the "restrictive" principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487-488.[1]

Section 1605(a) of the FSIA provides that a foreign state is not entitled to immunity if, among other things, the foreign state waives it, 28 U.S.C. 1605(a)(1), or if the state engages in commercial activity having a prescribed relationship to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is "based upon":

> (i) "a commercial activity carried on in the United States by the foreign state";
>
> (ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
>
> (iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[2] Section 1605(a)(5) further provides that a foreign state shall not be immune from other actions

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[1] Under the restrictive immunity principle, foreign nations and their instrumentalities can be sued in "cases arising out of a foreign state's strictly commercial acts," but not for actions "involving the foreign sovereign's public acts." *Verlinden*, 461 U.S. at 487.

[2] The FSIA's definitions state:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular

where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). See *Argentine Republic*, 488 U.S. at 439-441.[3]

2. Saudi Arabia owns and controls the King Faisal Specialist Hospital, a health care facility located in Riyadh, Saudi Arabia. It also owns and controls Royspec, the hospital's purchasing agent, which buys American medical supplies through an office located in this country. Beginning in 1973, Saudi Arabia contracted with an independent non-Saudi company, the Hospital Corporation of America (HCA), to recruit Americans for employment at the King Faisal Specialist Hospital. In 1983, while in the United States, Scott Nelson saw and answered an HCA advertisement for a position with that hospital. He attended a job interview in Saudi Arabia, returned to the United States, and signed an employment contract in Miami, Florida to work as a Monitoring Systems Engineer. Nelson attended a brief HCA orientation program in the United States. In December 1983, he began

transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

[3] Section 1605(a)(5) provides that this provision shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. 1605(a)(5)(A) and (B).

working at the King Faisal Specialist Hospital in Riyadh. Pet. App. 3a, 11a, 18a-19a.

The Nelsons' complaint arises from events that occurred during his employment in Saudi Arabia. The complaint alleges that on March 20, 1984, Scott Nelson discovered certain unspecified safety hazards while performing his job duties in monitoring facilities at the King Faisal Specialist Hospital and that Nelson reported those hazards to hospital officials and a Saudi government commission. Compl. ¶¶ 9, 10. The complaint further alleges that on or about September 27, 1984, "[a]s a direct and proximate result of these actions," Scott Nelson was summoned to the hospital security office, arrested by Saudi government agents, and imprisoned for 39 days, during which period he was interrogated, beaten, tortured, and held incommunicado. Compl. ¶¶ 11, 12. The complaint also alleges that a Saudi agent informed Nelson's wife that he could be released if she provided sexual favors. Compl. ¶ 13. See Pet. App. 4a, 19a.[4]

The Nelsons' complaint asserts, in total, 16 causes of action against petitioners. The causes of action fall into three basic categories. First, the Nelsons assert in Counts 1, 9, and 13 of the complaint that the petitioners negligently failed to warn Scott Nelson that Saudi officials "have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause." Compl. ¶¶ 15, 48, 68. Second, the Nelsons allege in Counts 2 through 7, 10, 11, 14, and 15 that petitioners committed various intentional torts against Scott Nelson. Third, the Nelsons assert in Counts 8, 12, and 16 spousal "derivative" claims alleging that Vivian

[4] Petitioners dispute those allegations. They admit that Nelson was arrested, but they allege that he was arrested on charges that he falsified his employment credentials by submitting a forged diploma. Pet. 4; Pet. App. 16a, 19a n.1.

Nelson sustained damages as a result of the foregoing alleged wrongs.[5]

3. Petitioners moved the district court to dismiss the Nelsons' complaint for lack of subject matter jurisdiction under the FSIA. The district court granted that motion. Pet. App. 18a-25a. The court noted that "[t]he parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1." Pet. App. 20a. That provision, the court stated, required the court to resolve two questions: "first, did any of the [petitioners] carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities." *Id.* at 21a.

The district court found that the "only commercial activities allegedly undertaken in this country by Saudi Arabia and [King Faisal Specialist Hospital] * * * relate to Nelson's recruitment" and that a separate corporation—HCA—actually conducted those activities. Pet. App. 21a. The court concluded that even if the Saudi government's involvement with HCA amounted to an agency relationship, "the link between the recruitment activities and the [petitioners] is not sufficient to establish 'substantial contact' with the United States." *Id.* at 21a-22a (quoting 28 U.S.C. 1603(e)). The court observed that the FSIA's legislative history gave various examples of "substantial contact," but none of those examples resembled the situation here. Pet. App. 22a-23a.[6]

[5] The complaint asserts eight of the 16 claims specifically against Saudi Arabia: negligence (Count 1); battery (Count 2); unlawful detainment (Count 3); wrongful arrest and imprisonment (Count 4); inhuman torture (Count 5); disruption of normal family life (Count 6); mental anguish (Count 7); and a spousal derivative claim (Count 8). The complaint asserts four essentially identical claims against the Hospital and Royspec: negligence (Counts 9 and 13); battery (Counts 10 and 14); false imprisonment (Counts 11 and 15); and a spousal derivative claim (Counts 12 and 16).

[6] The Nelsons also sued HCA in a separate action. See Pet. App. 19a n.2. That suit was dismissed under the statute of limitations and for contributory negligence stemming from Scott Nelson's submission of the falsified diploma to obtain Saudi employment. *Nelson* v. *Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990). The Eleventh Circuit affirmed that decision without opinion. *Nelson* v. *Hospital Corp. of America*, 946 F.2d 1546 (1991) (Table).

The district court reached a different conclusion with respect to Royspec. Acting as King Faisal Specialist Hospital's purchasing agent, Royspec had engaged in commercial activity in the United States. Pet. App. 23a. The court concluded, however, that the Nelsons' complaint was not "based on" Royspec's commercial activity. *Ibid.* See 28 U.S. 1605(a)(2). The court explained that "[t]he only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." Pet. App. 23a. The court found "absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint," *id.* at 23a-24a, and additionally stated that "even if the court had determined that [King Faisal Specialist Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint," *id.* at 24a.

4. The court of appeals reversed. Pet. App. 1a-17a. It concluded "that, on the facts presented, the recruitment and hiring of Nelson in the United States was a 'commercial activity' of the Saudi government, and that Nelson's subsequent detention and torture were 'based upon' Nelson's recruitment and hiring in the United States." *Id.* at 17a. The court of appeals reasoned that Saudi Arabia engaged in a commercial activity having substantial contact with the United States by contracting with HCA to act as Saudi Arabia's agent in recruiting Americans to work at the King Faisal Specialist Hospital. *Id.* at 11a-12a. The court further reasoned that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 15a.

Although the court of appeals did not squarely address the question, it apparently concluded that the King Faisal Specialist Hospital is also subject to suit. The court specifically held that Royspec was subject to suit, because Royspec maintains an office in Maryland and acts as purchasing agent for the Hospital, and because Nelson was given Royspec's telephone number so that his family could contact him and Nelson received telegrams concerning his employment bearing the telex designation "ROSPEC." Pet. App. 16a-17a.[7]

DISCUSSION

This Court should grant the petition for a writ of certiorari. The scope of the FSIA's commercial activity exception is a matter of considerable practical importance. The court of appeals' decision employs an unworkable ad hoc standard in determining whether a legal action is "based upon" a commercial activity, and it compounds the already substantial confusion among the lower courts in applying the "based upon" requirment. The importance of the issue is heightened in cases, as here, where the lawsuit implicates the foreign state's exercise of law enforcement activity within its own borders. This Court should review the court of appeals' decision and clarify the governing principles.

1. The court of appeals concluded that the Nelsons' action was "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), because the Nelsons alleged a factual relationship between the Saudi recruitment activity and Nelson's detention and alleged mistreatment:

> In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia.

Pet. App. 15a. The precise content of the court's test, which it describes as a "nexus" requirement, *id.* at 12a, 13a, 16a, is unclear. At most, the court of appeals' decision appears to require only that the commercial activity be a link in the chain of events that leads to a plaintiff's injury.[8] It may require even less.[9] In either event, the court of appeals' essentially ad hoc test is not anchored in the statutory text, and it does not provide a clear, predictable, or objective standard for ascertaining when a foreign state is subject to suit "based upon" its commercial activities.

The court of appeals' decision perpetuates the long-standing confusion among the courts concerning the commercial activity exception's "based upon" requirement. The courts of appeals have recognized that there must be a connection between the commercial activity and the plaintiff's cause of action, but they have provided little articulation and no clear consensus as to the precise nature of that required connection. For example:

- The Second and Third Circuits have concluded that the "based upon" standard is satisfied if there is some factual "nexus" between the commercial

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[7] Petitioners filed a petition for rehearing and suggested rehearing en banc. The United States filed a statement of interest as amicus curiae supporting petitioners. Pet. App. 29a-48a. The court of appeals denied the petition. *Id.* at 26a-27a.

[8] The court of appeals seems to have reasoned that Scott Nelson was recruited in the United States for the job of "detecting and reporting safety violations," he was arrested "as a result of those actions," and his arrest and mistreatment therefore "resulted from and were directly attributable to [his] employment." Pet. App. 16a. The court of appeals also stated that Saudi Arabia's argument that Saudi officials arrested Nelson based on his submission of a forged diploma "in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction." *Ibid.*

[9] The court of appeals concluded that Royspec was subject to suit merely on the basis that Nelson was given Royspec's telephone number and he received four telegrams regarding his employment that bore a telex designation—"ROSPEC"—that is similar to Royspec's business name. Pet. App. 17a.

activity and the plaintiff's grievance. *Barkanic* v. *General Admin. of Civil Aviation*, 822 F.2d 11, 13-14 (2d Cir.) (allowing a wrongful death action against a Chinese airline arising from a crash in China, where the airline sold the ticket in the United States through a nonexclusive sales agent), cert. denied, 484 U.S. 964 (1987), on appeal after remand, 923 F.2d 957 (2d Cir. 1991); *Sugarman* v. *Aeromexico, Inc.*, 626 F.2d 270, 272-273 (3d Cir. 1980) (allowing a tort action against a Mexican airline for delays at a Mexican airport where the airline sold the ticket in the United States through a nonexclusive agent for roundtrip travel to Mexico).

- The Fourth Circuit has stated that there must be a "material" connection between the commercial activity and the plaintiff's cause of action. See *Gerding* v. *Republic of France*, 943 F.2d 521, 527 (1991) (dismissing a wrongful death action arising from an American employee's illness aboard a French vessel, where the vessel had previously docked in the United States and the "Chef de Mission" attended meetings there, but did not request the medical records of American employees), petition for cert. pending, No. 91-956 (filed Dec. 4, 1991).

- The Fifth Circuit has purported to adopt the Third Circuit's "nexus" approach. *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195, 202 (1984) (dismissing a Panamanian vessel owner's action against Algeria for tortious deprivation of the vessel where the vessel was seized in the Mediterranean Sea and Algeria conducted no related business in the United States). That court has since stated, however, that the connection must be "material," *Stena Rederi*

AB v. *Comision de Contratos*, 923 F.2d 380, 387 (1991), and that the "focus should be on the elements of the cause of action itself," *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (1985).

- The Sixth Circuit has required "a connection between [the commercial] activity and the act complained of in the lawsuit." *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (1988) (remanding for further discovery an unfair competition suit against a French-owned corporation whose United States agent allegedly discussed but did not consummate an arrangement to acquire trade secrets). In an appeal after remand, that court has further stated that the "jurisdictional element is the commercial activity * * * plus a theory, a gravamen, that the plaintiff's injuries arise from the commercial activity." *Gould, Inc.* v. *Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (1991) (affirming denial of motion to dismiss), cert. dismissed, 112 S. Ct. 1657 (1992).

- The Seventh Circuit has stated that "a claim is 'based upon' events in the United States if those events establish a legal element of the claim." *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (1991) (dismissing a negligence action where the plaintiff, an employee of a French-owned airline, was injured by a fellow employee in France).

- The D.C. Circuit has stated that the "based upon" standard is satisfied if the plaintiff demonstrates a "direct causal connection" between the commercial activity and his suit *or* if the commercial activity is "an element of the cause of action under whatever law governs his claims." *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (1988) (dismissing an employee's breach of

contract action where the employee was originally recruited in the United States). See also *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982).

In short, the courts have failed to agree on a clear principle to guide the inquiry. The variety of verbal formulations represents genuine uncertainty concerning the application of the "based upon" requirement and has led to inconsistent results. See also *Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 582 n.10 (7th Cir.) (collecting additional cases), cert. denied, 493 U.S. 937 (1989); *Vencedora Oceanica Navigacion*, 730 F.2d at 200-201 (same).[10]

The longstanding confusion among the lower courts concerning the precise content of the "based upon" requirement presents an important question that is ripe for this Court's resolution. The question is especially important in the context presented here because it determines the justiciability of a suit between a foreign state and a citizen of the forum state arising from the foreign state's exercise of law enforcement powers within its own territory. The Nelsons' complaint specifically alleges that Scott Nelson was arrested and detained by law enforcement officers because of his actions in Saudi Arabia. Compl. ¶¶ 10, 11. Although petitioners and the Nelsons dispute, as a matter of fact, the grounds for his arrest and the nature of his treatment while in custody, there is no dispute that this case implicates Saudi Arabia's exercise of law enforcement authority within its borders.

[10] Thus, the Nelsons are mistaken in contending that "the present case is one of those happy instances where many different judges have read the same statute in exactly the same way." Br. in Opp. 9. Neither the courts nor commentators agree with that assessment. See, *e.g.*, *Vencedora Oceanica Navigacion*, 730 F.2d at 200 (noting the "widely varying formulations of the jurisdictional scope of this clause"); G. Born & D. Westin, *International Civil Litigation in United States Courts* 369 (1989) (observing that the "lower courts have reached divergent results" in applying the "based upon" requirement). Indeed, the court of appeals and the district court reached contradictory results in this case.

Whatever the factual merits of the Nelsons' claims, such suits are matters of particular sensitivity among sovereign nations.[11]

2. The court of appeals' interpretation of the FSIA's commercial activity exception is unsatisfactory, because it ignores the precise language of this carefully drafted statute and it fails to articulate a workable, objective standard for applying that provision. The FSIA, by its terms, sets forth the key concepts. The first clause of the commercial activity exception (which is the only clause at issue here) confers jurisdiction if: (a) the foreign state has "carried on" a "commercial activity" in the United States; and (b) the legal action is "based upon" that activity. 28 U.S.C. 1605(a)(2). Thus, this clause allows a suit against a foreign state only if the complaint identifies a commercial activity of the foreign nation *and* the complaint states a cause of action based on *that* activity.

a. The FSIA's definitions provide pertinent guidance in determining whether a foreign state has carried on a commercial activity in the United States. First, the FSIA defines the term "commercial activity" to include "a regular course of commercial conduct or a particular commercial transaction or act," and it specifically directs that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). See Amicus Brief for the United States in *Republic of Argentina* v. *Weltover, Inc.*, No. 91-763 (argued Apr. 1, 1992). Second, the FSIA defines the phrase "commercial activity carried on in the United States by a foreign state" as "commercial

[11] The issue presented here is important for the additional reason that it may affect the scope of the United States' sovereign immunity in foreign courts. Foreign relations depend to a large extent on reciprocal treatment between sovereigns. If United States courts invoke the FSIA's commercial activity exception to review how foreign states exercise police powers within their own borders, foreign courts may similarly elect to review the United States' exercise of police powers within its borders.

activity carried on by such state and having substantial contact with the United States." 28 U.S.C. 1603(e).

In this instance, the question whether petitioners engaged in a commercial activity arises on a pretrial motion to dismiss and must be judged on the basis of the Nelsons' untried allegations. According to those allegations, Saudi Arabia entered into a contract with HCA (a non-Saudi corporation) to recruit individuals in this country for overseas employment at the Saudi-owned King Faisal Specialist Hospital. If Saudi Arabia utilized HCA as its agent, then Saudi Arabia effectively "carried on" that recruiting activity in this country. See 1 Restatement (Second) of Agency § 1 (1958) (defining an agency relationship).[12] Furthermore, the recruitment of hospital employees is a "commercial activity" within the meaning of the FSIA. HCA engaged in a recruitment activity no different than a commercial hospital might engage in, extending contractual offers of employment to perform non-sovereign, health-care-related services. On the basis of those allegations, Saudi Arabia carried on a commercial activity in the United States.[13]

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[12] Under familiar principles of agency law, a principal may be liable for the actions of an agent empowered to act on the principal's behalf and under its control. See, *e.g.*, 1 Restatement (Second) of Agency § 144 (1958). Thus, if the foreign state employs an agent to carry on an activity in the United States, then the foreign state may be held to have "carried on" the activity itself. The court of appeals stated that the contract between Saudi Arabia and HCA "created an agency relationship." Pet. App. 11a. The district court, however, did not resolve that question, which raised a "factual issue." *Id.* at 21a-22a. Because the district court has not resolved the issue, we treat the Nelsons' allegation of an agency relationship as true.

[13] It is not clear that King Faisal Specialist Hospital has carried on a commercial activity in this country. As the court of appeals recognized, the Kingdom of Saudi Arabia—and not King Faisal Specialist Hospital—contracted with HCA to recruit employees for the hospital. Pet. App. 3a, 11a. See Notice of Filing in Support of Plaintiffs' Memorandum in Opposition to Defendant Royspec's Motion to Dismiss Complaint (S.D. Fla. June 29, 1989), Exh. 2 (agreement between the Royal Cabinet of the Kingdom of Saudi Arabia and HCA). Petitioners do not dispute that Royspec, as purchasing agent for the hospital,

b. That, however, is not the end of the inquiry. The FSIA requires that the Nelsons' action be "based upon" the foreign state's commercial activity in this country. 28 U.S.C. 1605(a)(2). The FSIA does not define the term "based upon," but its meaning is readily discernible from the statutory context: A lawsuit is "based upon" a commercial activity if the commercial activity provides the basis for the cause of action. The application of that concept is straightforward in the typical case of commercial contracts. If a foreign state promises to perform a commercial contract in this country, the foreign state's commercial undertaking gives rise to a legally enforceable obligation and provides the basis for a cause of action for breach of contract if the foreign state fails to perform.[14]

In this case, the Nelsons do not allege a breach of Scott Nelson's employment contract.[15] Instead, the Nelsons allege that petitioners have committed various torts. The

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carries on commercial activity in the United States. As we explain below, however, that activity appears to have no relationship to the Nelsons' complaint.

[14] This approach is consistent with the examples provided in the congressional reports on the legislation. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, 18-19 (1976). In addition, this approach is consistent with the House Report's description of how the "based upon" requirement applies to the second clause of the commercial activity exception, which allows suits "based upon * * * an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. 1605(a)(2). The House Report states that "the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action." H.R. Rep. No. 1487, *supra*, at 19.

[15] Significantly, the employment contract (which is between King Faisal Specialist Hospital and Scott Nelson and provides for performance in Saudi Arabia) states that in the case of any dispute arising from this contract, the Saudi courts, authorities, or commissions only will have jurisdiction. See Pet. App. 24a n.4. The employment contract is attached as an exhibit accompanying an affidavit filed with Royspec's motion to dismiss the complaint for lack of jurisdiction. See Declaration of Ali S. Al-Shabrami (Mar. 1, 1989).

FSIA allows a complainant to invoke the commercial activity exception in a tort action.[16] As in contract actions, however, the foreign state's commercial activity in this country must provide the basis for the cause of action.

The commercial activity involved here—Saudi Arabia's recruitment of Scott Nelson to work at its overseas hospital—does not provide a basis for the intentional injury and related spousal derivative claims that the Nelsons assert in their complaint. The Nelsons do not allege that the Saudi authorities *recruited* Scott Nelson in this country with the intent to injure or imprison him. Under familiar tort principles, the Saudi recruiting activity plainly does not provide the basis for a cause of action based on intentional injury, because the recruiting activity was not undertaken with the intention to cause the alleged harm. See, *e.g.*, 1 Restatement (Second) of Torts §§ 13 and 14 (battery), 21 (assault), 35 (false imprisonment) (1965). And because the recruitment activities do not provide a basis for the intentional injury claims, it cannot support Vivian Nelson's related spousal derivative claims.[17]

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[16] Section 1605(a)(5) of the FSIA (which this Court has described as the exception for "noncommercial torts," *Argentine Republic*, 488 U.S. at 439) indicates by implication that the commercial activity exception may embrace tort actions. It provides an exception from immunity in specific tort actions "not otherwise encompassed in paragraph (2) above"—viz., the commercial activity exception. See 28 U.S.C. 1605(a)(5). Thus, the FSIA contemplates that when a foreign state conducts a commercial activity, it is subject to the same types of tort suits that a private business would encounter. See also H.R. Rep. No. 1487, *supra*, at 17 (noting that the commercial activity exception encompasses actions based on "business torts occurring in the United States").

[17] As we have indicated (note 13, *supra*), it appears that King Faisal Specialist Hospital did not carry on any commercial activity in the United States. There is accordingly no basis for suit against that entity. In the case of Royspec, its only involvement with Nelson was the provision of a telephone number that his family could use to reach

The Nelsons' negligence claims should be analyzed in the same way. We do not understand Saudi Arabia to dispute that when it conducts recruitment activity in this country, it must comply with federal and state law governing the activity, including standards of conduct enforced through tort law. Thus, if Saudi Arabia somehow breaches a duty of reasonable care in its recruitment activity, it may be subject to suit for negligence. See generally 2 Restatement (Second) of Torts §§ 281, 282, 298 (1965). Because of its mistaken interpretation of the FSIA's "based upon" requirement, the court of appeals did not address whether the Nelsons' allegations concerning the Saudi *recruiting* activity provide the basis for a state law negligence cause of action.[18]

The question whether Florida law provides a basis for the Nelsons' negligence claims is perhaps best addressed in future proceedings, after this Court clarifies that any negligence claim must be "based upon," and not simply causally related to, the Saudi recruiting activity. We note, however, that there appears to be no principle of tort law holding that Saudi Arabia is under a legal obligation to warn prospective employees that Saudi law enforcement practices differ from American practices. Although American tort law recognizes that a party may be liable for intentional or negligent misrepresentations con-

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him in the case of an emergency. That action plainly does not provide a basis for the causes of action alleged here.

[18] The Seventh Circuit's *Santos* decision employed an analysis similar to the approach that we advocate, stating that "if the plaintiff claims a breach of a duty that arose within the United States, jurisdiction is present." 934 F.2d at 894. The Seventh Circuit suggested that the Eleventh Circuit's outcome in *Nelson* was consistent with its approach, but the Seventh Circuit failed to identify the "duty that arose within the United States." *Ibid.* The Seventh Circuit presumably did not review the specific content of the Nelsons' complaint in light of Florida law, and hence was in a poor position to evaluate that question.

cerning a commercial transaction, we have found no legal principle imposing a legal duty on a foreign state to warn prospective employees about how the foreign state might exercise its police powers.[19] Indeed, the creation of such a duty—which would require a foreign state to forecast how it might discharge its sovereign prerogatives—would create tension with the underlying principle of restrictive sovereign immunity, which posits that a foreign state retains immunity with respect to its sovereign "public acts." See *Verlinden*, 461 U.S. at 487.[20]

In sum, although the Nelsons have adequately alleged at this juncture that Saudi Arabia carried on a commercial

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[19] For example, American courts generally recognize that "one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information." 2 Restatement (Second) of Torts § 311 (1965); see also 3 *id.* § 552 (negligent misrepresentation involving pecuniary loss). Nevertheless, and notwithstanding the substantial number of Americans who are employed overseas, we have discovered no case where an employer (whether governmental or private) was subject to liability based on a failure to warn a prospective overseas employee about the character of foreign law. Cf. *Arango* v. *Guzman Travel Advisors*, 761 F.2d 1527 1536 & n.10 (11th Cir.) (expressing doubt "whether Florida law would obligate an airline to ensure that its passengers were aware that they might not be permitted to enter a foreign nation"), cert. denied, 474 U.S. 995 (1985); *Jones* v. *Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 345 (S.D. Tex. 1989) (failing to reach the issue whether a foreign state was obligated to warn an employee "of danger from nearby insurgents").

[20] The enforcement of such a duty to warn through the FSIA's commercial activity exception would be especially anomalous, because the FSIA's noncommercial tort exception specifically retains the foreign state's immunity with respect to the actual exercise of such sovereign powers. The noncommercial tort exception does not encompass: "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 1605(a)(5).

activity in the United States, the Nelsons' legal action does not appear to be "based upon" that activity within the meaning of the FSIA. The court of appeals' contrary conclusion has the effect of subjecting a foreign state to the jurisdiction of a United States court concerning a matter that the FSIA places outside the authority of those courts. This Court should review that decision and clarify the governing principles.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, *et al.*,
Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR RESPONDENTS TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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1. The United States ("the Government") urges this Court to grant the petition for certiorari on the basis of "confusion" in the decisions of the courts of appeals that does not, in fact, exist. As evidence of such confusion, the Government cites slight variations in the way courts have articulated the "based upon" requirement of the "commercial activities" exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2). Notwithstanding these variations, each of the circuits applies the same substantive standard.

a. Under this standard, the circuit courts, including the court below, uniformly hold that an "action is *based upon* a commercial activity carried on in the United States by a foreign state" when there is a "nexus" between that commercial activity and the conduct giving rise to the action.[1] "Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity." *Stena Rederi AB*, 923 F.2d at

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[1] The strikingly similar language with which the courts have described the "based upon" requirement belies the Government's assertion that there is some "longstanding confusion" among the circuits (Brief for the United States as Amicus Curiae at 9) (hereinafter "U.S. Brief"): *Second Circuit*—requiring "a nexus * * * between the commercial activity in the United States and the cause of action," *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir. 1987), *cert. denied*, 484 U.S. 964 (1987); *Third Circuit*—requiring a nexus, *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980); *Fourth Circuit*—requiring a "material connection," *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956); *Fifth Circuit*—requiring a "material connection," *Stena Rederi AB v. Commission de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991); *Sixth Circuit*—requiring "a connection," *Gould, Inc. v. Mitsui Mining and Smelting Co.*, 947 F.2d 218, 220 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992); *Ninth Circuit*—requiring "a nexus," *America West Airlines Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989); *Eleventh Circuit*—requiring a "jurisdictional nexus" (Pet. App. 12a); *District of Columbia Circuit*—requiring a "direct causal connection" or that the commercial activity be "an element of the cause of action," *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988).

387. Nor is the mere fact that a commercial activity in the United States occasioned a plaintiff's presence in a foreign state sufficient to support jurisdiction under section 1605(a)(2). *E.g., Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 (7th Cir. 1991); *Zedan*, 849 F.2d 1514. Instead, jurisdiction exists under the first clause of section 1605(a)(2) only when the conduct giving rise to the action constitutes or is directly related to a commercial activity in the United States. *See supra* note 1.

b. The Government cites only one case that articulates what is arguably a different formulation of the nexus requirement.[2] In *Santos*, the Seventh Circuit stated that "a claim is 'based upon' events in the United States if those events establish a legal element of the claim." 934 F.2d at 893. As a matter of substance, however, the Seventh Circuit reaches the same result as every other circuit. The conflict asserted is illusory.[3]

Even if the purported conflict stemming from the *Santos* decision were real, however, the present case would be an

[2] The Government also cites *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) and G. Born and D. Westin, *International Civil Litigation in United States Courts* (1989) (which relies on *Vencedora*) for the proposition that the courts are in conflict. (U.S. Brief at 12 n.10). In fact, the Fifth Circuit adopted the "nexus" test in *Vencedora*, and the "varying formulations" enumerated in that case have since been rejected by every circuit in favor of the "nexus" or, in *Santos*, the substantially similar "legal element" test.

[3] *Santos* would have been dismissed even if the Seventh Circuit had articulated the nexus requirement in the same manner as every other circuit. *Santos* involved an employee of a U.S. corporation who found himself in France as a result of a leasing agreement between Air France (an instrumentality of France) and his employer. He was subsequently injured in a vehicular accident involving an Air France employee. As the *Santos* court acknowledged, the only connection between a commercial activity in the U.S. and the injurious conduct was that, had it not been for the lease, the plaintiff would not have been in France. 934 F.2d at 892. As discussed above, the circuits agree that this is not a close enough connection between a commercial activity in the U.S. and the complained of conduct to support jurisdiction under section 1605(a)(2).

inappropriate vehicle for resolving it because application of the *Santos* "legal element" test would not change the result here. Indeed, in *Santos*, the Seventh Circuit cited the opinion below with approval. The court reasoned that under the standard it was advocating, the duty on the part of the Saudi defendants not to detain, torture or otherwise punish Mr. Nelson for performing his duties at the King Faisal Specialist Hospital ("KFSH") arose out of the fact that the Saudi defendants recruited and employed him to perform those duties in the U.S. *Id.* at 894.[4]

2. Rejecting the common sense notion that an action is "based upon" commercial activity if it directly relates to or arises out of such activity, the Government would

[4] Under *Santos*, it is not required that the commercial activity actually constitute an element of the action. Rather, it is sufficient that "the duty [or other element] *arose from* commercial acts in the United States." 934 F.22 at 893 (emphasis added). Accordingly, the *Santos* court also cited with approval the decisions of several courts holding that where the national airline of a foreign government "sell[s] a plane ticket or otherwise make[s] travel arrangements in the United States (creating a duty of care in providing safe passage) and the flight crashes during travel outside the United States," jurisdiction is proper under section 1605(a)(2). Jurisdiction was found in these cases despite the fact that the airline obviously owes such a duty of care to all of its passengers regardless of whether commercial activity in the United States is involved. 934 F.2d at 894. (citing, among others, *Sugarman*, 626 F.2d at 272-74 and *Barkanic*, 822 F.2d at 13).

Correct application of the *Santos* "legal element" test would produce a finding of jurisdiction in each case cited in the Government's brief in which jurisdiction was found under the nexus test. In addition to *Nelson*, *Sugarman* and *Barkanic*, jurisdiction would have been found in *Gould*, 947 F.2d at 222 (involving substantial contract negotiations in U.S. during course of which an instrumentality of France misappropriated plaintiffs' trade secrets), and in *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 (D.C. Cir. 1982) (involving contract executed in U.S. for deliberate purpose of enticing plaintiff to Ireland in order to misappropriate his equipment, patents and trade secrets). Inasmuch as the *Santos* approach produces the same substantive results as the "nexus" test, there is no basis for the Government's assertion that the courts are employing "an unworkable ad hoc standard." (U.S. Brief at 8.)

interpret the first clause of section 1605(a)(2) to grant jurisdiction only where "the foreign state's commercial activity in [the U.S.] * * * provides the basis for the cause of action." (U.S. Brief at 15.) Under this standard, it presumably would not suffice that one element of the cause of action arise out of commercial activity within the United States, as in *Santos*. Rather, that activity, in and of itself, would have to provide the basis of the entire cause of action. Such a standard conflicts with the plain language, structure, underlying purposes and legislative history of the FSIA, as well as with the opinions of every circuit court that has considered the issue.

a. Congress did not intend to limit jurisdiction under the first clause of section 1605(a)(2) to situations in which the commercial act comprises the cause of action. Instead, Congress provided for jurisdiction over a foreign state in all actions "based upon a commercial activity carried on in the United States." As the courts have consistently held, this phrase is broad enough to include cases in which the commercial act constitutes the conduct giving rise to the action, as well as cases in which the commercial act directly causes or relates to such conduct.

b. To support its narrow interpretation of the first clause of section 1605(a)(2), the Government cites legislative history on the second clause, which provides for jurisdiction where "the action is based upon * * * an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." Because the House Report states that "the acts (or omissions) encompassed in [clause two] are limited to those which in and of themselves are sufficient to form the basis of a cause of action," H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19 (1976), the Government reasons that the same must hold true for clause one. (U.S. Brief at 15 n.14.)

This argument ignores the fact that Congress' purpose in enacting the FSIA was to provide American citizens "access to the courts in order to resolve ordinary legal disputes" with foreign states, H.R. Rep. No. 1487, *supra*,

at 6,[5] while protecting against the danger that "'our courts [might be] turned into small 'international courts of claims[,]' * * * open * * * to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (quoting, Hearings on H.R. 11315, *supra*, at 31 (testimony of Bruno Ristau, Chief, Foreign Litigation Section, Department of Justice)). To advance both these purposes, Congress enacted "substantive provisions requiring some form of substantial contact with the United States." *Id.* at 491.

Section 1603(e), by way of definition, limits the U.S. "commercial activity" referred to in the first clause of section 1605(a)(2) to activity "having substantial contact with the United States." Accordingly, apart from a nexus with the conduct complained of, no further restriction on access to American courts was intended or required. By contrast, the second clause does not require any commercial activity whatsoever to take place in the United States. Therefore, the House Report appropriately states that in this circumstance—and this circumstance alone—the act performed here must be sufficient in and of itself "to form the basis of a cause of action." The Government's interpretation would erase this distinction carefully drawn by Congress between clauses one and two.

c. The Government also maintains that its "approach is consistent with the examples provided in the congressional reports on the legislation." (U.S. Brief at 15 n.14.) In fact, its formulation would immunize foreign states far more broadly than Congress expressly intended.

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[5] *See also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State) (hereinafter, *Hearings on H.R. 11315*) ("[T]he bill['s] * * * general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would.").

Accordingly, *certiorari* should not rest on the assumption that there is a valid basis for this novel theory.

The legislative history cites, as an important example of a U.S. commercial activity, "an indebtedness incurred by a foreign state which *negotiates or executes* a loan agreement in the United States." H.R. Rep. No. 1487, *supra*, at 17 (emphasis added). Yet, under the Government's approach, section 1605(a)(2) would not grant jurisdiction even where all the negotiations on a loan agreement or other commercial contract took place in the United States, provided only that the contractual obligation ripened and the breach occurred elsewhere. In such case, no commercial activity would have occurred in the United States "provid[ing] the basis for the cause of action."[6] For instance, had Mr. Nelson alleged that Saudi Arabia and KFSH actively recruited him in the United States and engaged in detailed and protracted negotiations here, under the Government's theory he would be unable to sue them for wrongful termination or other contractual breach if the final offer, acceptance and breach all occurred in Saudi Arabia. Plainly, this is inconsistent with the FSIA's underlying purpose of according American citizens a U.S. forum for redressing their private disputes with foreign states.[7]

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[6] Taking the same approach to section 1605(b) of the FSIA likewise would yield results Congress did not intend. Section 1605(b) provides an exception to foreign state immunity for certain suits in admiralty to enforce a maritime lien, which "lien is based upon a commercial activity of the foreign state." Application of a requirement that the commercial activity comprise the cause of action would preclude the bringing of traditional maritime actions, such as collision claims. Accordingly, under the Government's approach, "many litigants who could have maintained an action in the courts of this country during the period when the Tate Letter was the controlling factor would now find themselves without a remedy in our courts." *China Nat'l Chemical Import & Export Co. v. M/V Lago Hualaihue*, 504 F. Supp. 684, 690 (D. Md. 1981).

[7] In fact, far from supporting the Government's theory, the only statement in the legislative history of the FSIA that explains the meaning of the "based upon" requirement of clause one supports the result in the court below. *See Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 29 (1973) (testimony of Bruno Ristau) ("If a dispute arises *as a result of* an activity which a government carries on in this country, the most appropriate place to resolve such a dispute would be in this country through the courts[.]") (emphasis added).

3. The Government concedes, as it must, that Mr. Nelson's recruitment in the United States by an agent of Saudi Arabia—the Hospital Corporation of America ("HCA")—constitutes "a commercial activity carried on in the United States" by Saudi Arabia. (U.S. Brief at 14.)[8] It then argues, however, that HCA's sole principal was Saudi Arabia, and therefore "it appears that [KFSH] did not carry on any commercial activity in the United States." (*Id.* at 16 n.17.) It bases this argument solely upon its assertion that only "the Kingdom of Saudi Arabia—and not [KFSH]—contracted with HCA to recruit employees for the hospital." (*Id.* at 14 n.13.)

In fact, both KFSH and Saudi Arabia were parties to and signed the contract with HCA. An attachment to the contract bears the seal of KFSH on each page and explicitly states that "HCA will provide recruitment services to [KFSH]." The Declaration of Ali S. Al-Shabrami, cited by the Government (*id.* at 15 n.15), states that "The hospital * * * has a contract with HCA vesting exclusive responsibility for recruiting in the U.S." Moreover, among HCA's commercial activities in the United States, conducted on behalf of and as agent for KFSH, was the execution of an employment contract with Mr. Nelson.[9] Finally, Mr. Nelson's complaint alleges that

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[8] *See* H.R. Rep. No. 1487, *supra*, at 16 ("Activities such as a foreign government's * * * employment or engagement of laborers * * * would be among those included within the definition.").

[9] The Government admits the employment contract was between Mr. Nelson and KFSH, but does not acknowledge that he was also an employee of Saudi Arabia. (U.S. Brief at 15 n.15.) In fact, an addendum to Mr. Nelson's contract states that Mr. Nelson "will be an employee of the Government of Saudi Arabia at [KFSH]." Similarly, a document sent to Mr. Nelson from KFSH extending him a conditional offer states that it is an offer "to you on behalf of the

KFSH is "an agent, instrumentality and alter ego of the sovereign nation of Saudi Arabia" and that Mr. Nelson was recruited in Miami, Florida by KFSH "or its agents to fill the position of Monitoring Systems Engineer at KFSH." (Complt. ¶¶ 40, 41.) All of these allegations must be accepted as true for purposes of resolving this petition.[10]

4. The Government appears to acknowledge that if Respondents can establish that their cause of action is "based upon a commercial activity carried on in the United States," jurisdiction is proper under the FSIA. Accordingly, the Government has retreated from the position it took in the court below that the "police conduct" of Saudi officials in arbitrarily detaining and torturing Mr. Nelson "is clearly sovereign rather than commercial * * * [and], therefore, not covered by the FSIA commercial activities exception, regardless of whether or not it is intertwined with commercial activity." (Pet. App. 44a-45a).[11] Instead, the Government now merely notes some

Saudi Arabian Government for employment at the King Faisal Specialist Hospital Center in Riyadh, Saudi Arabia, for 24 months."

[10] The complaint also alleges that Royspec can be held liable for the acts of Saudi Arabia and KFSH because it is an "agent, instrumentality and alter ego of the sovereign nation of Saudi Arabia and the King Faisal Specialist Hospital" and it was directly involved in Mr. Nelson's recruitment and employment. (Complt. ¶¶ 60-62.) These allegations must be accepted as correct and were so accepted by the court below. (Pet. App. 16a-17a.)

[11] Even if the FSIA authorized such a "law enforcement" exception, which it does not, the Government's argument in the court below misses the mark. Suit was brought against KFSH, Royspec and the Saudi government based solely on the commercial activities of these three entities in connection with their retaliation against Mr. Nelson for his having performed precisely those job functions he was recruited and employed to perform in the United States. Neither KFSH nor Royspec is a law enforcement agency. Moreover, the Saudi Government was engaged neither in law enforcement nor in any other function recognizably sovereign in character when it intervened at the bequest of administrators at a state run hospital in a private dispute with one of the hospital's employees. Certainly it performed no legitimate sovereign function when its intervention turned to torture.

"heightened" importance to this case because "it implicates the foreign state's exercise of law enforcement activity within its own borders." (U.S. Brief at 8.)[12]

The Court should decline the Government's veiled invitation to erect, outside the FSIA, some exceptional immunity for acts otherwise clearly subject to the jurisdiction of our courts based solely upon the alleged involvement of law enforcement personnel or functions.[13] The

[12] The Government's representation that there is "no dispute" concerning this implication of law enforcement authority is incorrect. In Respondents' Brief in Opposition to Petition of Writ of Certiorari, Respondents flatly denied the existence of any facts suggesting the "exercise of police power." (*Id.* at 1-4.)

The Government argues that if jurisdiction in this case is allowed to stand, "foreign courts may similarly elect to review the United States' exercise of police power within its borders." (U.S. Brief at 13 n.11.) Experience suggests that this concern is entirely speculative. First, foreign states have been subject to the jurisdiction of U.S. courts for the tortious and egregious acts of their law enforcement authorities committed on U.S. territory since 1980. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). Yet, in the last twelve years, agents of U.S. law enforcement operating abroad have not found themselves burdened with foreign lawsuits, frivolous or otherwise. Second, much of the law enforcement responsibility in this country is entrusted not to federal or even to state authorities, but rather to county and municipal governments. Although it is well established that such local and municipal entities are not entitled to immunity under international law, *e.g.*, 6 M. Whiteman, *Digest of International Law* 589 (1968), local and municipal law enforcement authorities have not been, so far as we can ascertain, pressed to defend their conduct in foreign courts.

[13] To the extent the Government correctly characterizes these functions as raising "matters of particular sensitivity among sovereign nations" (U.S. Brief at 13), the doctrine implicated is not sovereign immunity, but act of state. *E.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697-98 (1976). Though the act of state doctrine is not before this Court, it is worth noting that torture and other universally condemned practices can under no circumstances be characterized as official acts of state. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Liu v. Republic of China*, 892 F.2d 1419, 1433-34 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 27 (1990); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," which jurisdiction in "'every action * * * depends on the existence of one of the specified exceptions to foreign sovereign immunity.'" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989) (quoting *Verlinden*, 461 U.S. at 493). Accordingly, if correctly applying the appropriate standard under one of the enumerated statutory exceptions, a court determines that jurisdiction is proper, the FSIA permits, indeed requires, no further inquiry.

5. Even were the Court to adopt the standard urged by the Government, the FSIA would provide jurisdiction over Respondents' negligence Counts (Counts 1, 9 and 13). The Government concedes as much, stating that "if Saudi Arabia somehow breaches a duty of reasonable care in its recruitment activity, it may be subject to suit for negligence." (U.S. Brief at 17.) The Government argues, however, that Florida tort law provides no basis upon which Saudi Arabia could be found liable, for example, on a negligent failure to warn theory. (*Id.* at 17-18.)[14] The issue whether Respondents have stated a cause of action for negligence under Florida law is not one that this Court need review. Nor should it, as the Government intimates, immunize Saudi Arabia with respect to a negligence claim of this type, where (as here) jurisdiction arises even under the Government's own interpretation of the FSIA's commercial activities exception. (*Id.* at 18.)

CONCLUSION

For the foregoing reasons, respondents request that the petition in No. 91-522 be denied.

[14] In support of its interpretation of Florida law, the Government cites only *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1536 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985). *Arango* did not reach the issue. Moreover, the question of duty to warn arose under circumstances quite different from those here. Finally, in an earlier decision in the same case, the Fifth Circuit held that jurisdiction existed under section 1605(a)(2) because the negligence claims there were based upon the foreign state-owned airline's commercial activities in the United States. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379-80 (5th Cir. 1980).

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No. 91-522

In the Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, ET AL., PETITIONERS

v.

SCOTT NELSON AND VIVIAN NELSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit by a United States citizen against a foreign state alleging that the foreign state recruited him in this country for overseas employment and then imprisoned and tortured him on account of his employment-related activity in the foreign state.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-522

SAUDI ARABIA, ET AL., PETITIONERS

v.

SCOTT NELSON AND VIVIAN NELSON

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has a significant interest in the interpretation of the Foreign Sovereign Immunities Act, which protects the rights of both foreign nations and private litigants in United States courts by establishing uniform, objective standards for determining a foreign state's immunity from suit. See 28 U.S.C. 1602. This Court invited the views of the United States at the petition stage.

STATEMENT

Petitioners Kingdom of Saudi Arabia, King Faisal Specialist Hospital (a Saudi-owned health care facility), and Royspec (a Saudi-owned purchasing agency), challenge a court of appeals judgment hold-

ing that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, confers jurisdiction over a lawsuit filed by respondents Scott and Vivian Nelson. The Nelsons, who are American citizens, filed an action in the United States District Court for the Southern District of Florida seeking damages resulting from the Saudi government's arrest and alleged mistreatment of Scott Nelson in 1984, while he was employed by the King Faisal Specialist Hospital in Saudi Arabia. The district court dismissed the Nelsons' suit, rejecting their contention that the FSIA confers subject matter jurisdiction to adjudicate the dispute. Pet. App. 18a-25a. The court of appeals reversed, holding that the FSIA confers jurisdiction because the Nelsons' suit is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). Pet. App. 1a-17a.

1. The FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Enacted in 1976, the FSIA provides the courts with objective criteria to determine whether suits against foreign states shall proceed. The FSIA replaces the prior ad hoc approach in which the courts deferred to what was sometimes perceived as the Executive Branch's desires based on foreign policy objectives. See *id.* at 486-488.

The FSIA gives the United States district courts original subject matter jurisdiction over nonjury civil actions against a foreign state, including suits by foreign plaintiffs, as to claims for relief with respect to which the foreign state is not entitled to immunity

under Sections 1605 through 1607 of the FSIA (28 U.S.C. 1605-1607). 28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489. The FSIA further provides that the district court shall have personal jurisdiction over the foreign state as to those claims in which service of process has been made in accordance with the FSIA. 28 U.S.C. 1330(b).

The crucial inquiry is the scope of the foreign state's immunity. Section 1604 of the FSIA states the general rule:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. Sections 1605 through 1607 provide exceptions to the general rule that essentially codify the "restrictive" principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487-488.[1]

Section 1605(a) of the FSIA provides that a foreign state is not entitled to immunity if, among other things, the foreign state waives it, 28 U.S.C. 1605(a)(1), or if the state engages in commercial activity bearing a prescribed relationship to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is "based upon":

> (i) "a commercial activity carried on in the United States by the foreign state";

[1] Under the restrictive immunity principle, foreign nations and their instrumentalities can be sued in "cases arising out of a foreign state's strictly commercial acts," but not for actions "involving the foreign sovereign's public acts." *Verlinden*, 461 U.S. at 487.

(ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or

(iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[2] Section 1605(a)(5) further provides that a foreign state shall not be immune from other actions where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-441 (1989).[3]

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[2] The FSIA's definitions state:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

[3] Section 1605(a)(5) states that this provision shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

2. Saudi Arabia owns and controls the King Faisal Specialist Hospital, a health care facility located in Riyadh, Saudi Arabia. It also owns and controls Royspec, the hospital's purchasing agent, which buys American medical supplies through an office located in this country. Beginning in 1973, Saudi Arabia contracted with an independent non-Saudi company, the Hospital Corporation of America (HCA), to recruit Americans for employment at the King Faisal Specialist Hospital. In 1983, while in the United States, Scott Nelson saw and answered an HCA advertisement for a position with that hospital. He attended a job interview in Saudi Arabia, returned to the United States, and signed an employment contract in Miami, Florida to work as a Monitoring Systems Engineer. Nelson attended a brief HCA orientation program in the United States. In December 1983, he began working at the King Faisal Specialist Hospital in Riyadh. Pet. App. 3a, 11a, 18a-19a.

The Nelsons' complaint arises from events that occurred during his employment in Saudi Arabia. The complaint alleges that on or about March 20, 1984, while performing his job duties in monitoring facilities at the King Faisal Specialist Hospital, Scott Nelson discovered certain unspecified safety hazards and reported those hazards to hospital officials and a Saudi government commission. Compl. ¶¶ 9, 10. The complaint further alleges that on or about September 27, 1984, "[a]s a direct and proximate result of these actions," Scott Nelson was summoned to the

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(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. 1605(a)(5)(A) and (B).

hospital security office, arrested by Saudi government agents, and imprisoned for 39 days, during which period he was interrogated, beaten, tortured, and held incommunicado. Compl. ¶¶ 11, 12, 13. The complaint also alleges that a Saudi agent informed Nelson's wife that her husband could be released if she provided sexual favors. Compl. ¶ 13. See Pet. App. 4a, 19a.[4]

The Nelsons' complaint asserts 16 causes of action against petitioners. The causes of action fall into three basic categories. First, in Counts 1, 9, and 13 of the complaint, the Nelsons allege that the petitioners negligently failed to warn Scott Nelson that Saudi officials "have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause," Compl. ¶¶ 15, 48, 68, and that "employees and/or officials of the [King Faisal Specialist Hospital] would be likely to take severe retaliatory action against Nelson if he reported and/or attempted to remedy, and/or disclosed to others any health-related or other hazards or problems which he discovered in [the hospital]." Compl. ¶¶ 16, 49, 69. Second, in Counts 2 through 7 and Counts 10, 11, 14, and 15, the Nelsons allege that petitioners committed various intentional wrongs against Scott Nelson. Third, in Counts 8, 12, and 16, the Nelsons assert spousal "derivative" claims alleging that Vivian Nelson sustained damages as a result of the foregoing alleged wrongs.[5]

[4] Petitioners dispute most of those allegations. They admit that Nelson was arrested, but they allege that he was detained on charges that he falsified his employment credentials by submitting a forged diploma. Pet. 4; Pet. App. 16a, 19a n.1. In the brief the Nelsons filed in response to the United States' amicus brief at the petition stage, the Nelsons contend that they have "flatly denied the existence of any facts suggesting the 'exercise of police power.'" Resp. Reply Br. to U.S. Amicus Br. 9 n.12. Their complaint, however, alleges that Scott Nelson was "arrested," Compl. ¶¶ 15, 48, 68, alleges acts by Saudi Arabian agents or employees "in their official capacity," Compl. ¶ 18, and defines the tort of "torture" as one committed by public or law enforcement officials. Compl. ¶¶ 23, 26.

3. Petitioners successfully moved the district court to dismiss the Nelsons' complaint for lack of subject matter jurisdiction under the FSIA. Pet. App. 18a-25a. The district court noted that "[t]he parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1." Pet. App. 20a. That provision, the court stated, required the court to resolve two questions: "first, did any of the [petitioners] carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities." *Id.* at 21a.

The district court found that the "only commercial activities allegedly undertaken in this country by Saudi Arabia and [King Faisal Specialist Hospital] * * * relate to Nelson's recruitment" and that a separate corporation—HCA—actually conducted those activities. Pet. App. 21a. The court concluded that even if the Saudi government's involvement with HCA amounted to an agency relationship, "the link between the recruitment activities and the [petitioners] is not sufficient to establish 'substantial contact' with

[5] The complaint asserts eight of the 16 claims specifically against Saudi Arabia: negligence (Count 1); battery (Count 2); unlawful detainment (Count 3); wrongful arrest and imprisonment (Count 4); inhuman torture (Count 5); disruption of normal family life (Count 6); mental anguish (Count 7); and a spousal derivative claim (Count 8). The complaint asserts four essentially identical claims against the Hospital and Royspec: negligence (Counts 9 and 13); battery (Counts 10 and 14); false imprisonment (Counts 11 and 15) and a spousal derivative claim (Counts 12 and 16).

the United States." *Id.* at 21a-22a (quoting 28 U.S.C. 1603(e)). The court observed that the FSIA's legislative history gave various examples of "substantial contact," but none of those examples resembled the situation here. Pet. App. 22a-23a.[6]

In contrast, the district court concluded Royspec had engaged in commercial activity in the United States by acting as King Faisal Specialist Hospital's purchasing agent. Pet. App. 23a. The court concluded, however, that the Nelsons' complaint was not "based upon" Royspec's commercial activity. *Ibid.* See 28 U.S.C. 1605(a)(2). The court explained that "[t]he only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." Pet. App. 23a. The court found "absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint," *id.* at 23a-24a, and additionally stated that "even if the court had determined that [King Faisal Specialist Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint," *id.* at 24a.

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[6] The Nelsons also sued HCA in a separate action. See Pet. App. 19a n.2. That suit was dismissed under the statute of limitations and for contributory negligence stemming from Scott Nelson's submission of the falsified diploma to obtain Saudi employment. *Nelson* v. *Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990). The Eleventh Circuit affirmed that decision without opinion. *Nelson* v. *Hospital Corp. of America*, 946 F.2d 1546 (1991) (Table).

4. The court of appeals reversed. Pet. App. 1a-17a. It concluded "that, on the facts presented, the recruitment and hiring of Nelson in the United States was a 'commercial activity' of the Saudi government, and that Nelson's subsequent detention and torture were 'based upon' Nelson's recruitment and hiring in the United States." *Id.* at 17a. The court of appeals reasoned that Saudi Arabia engaged in a commercial activity having substantial contact with the United States by contracting with HCA to act as Saudi Arabia's agent in recruiting Americans to work at the King Faisal Specialist Hospital. *Id.* at 11a-12a. The court further reasoned that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 15a.

Although the court of appeals did not squarely address the question, it apparently concluded that the King Faisal Specialist Hospital is also subject to suit. The court specifically held that Royspec was subject to suit, because Royspec maintains an office in Maryland and acts as purchasing agent for the Hospital, because Nelson was given Royspec's telephone number so that his family could contact him, and because Nelson received telegrams concerning his employment bearing the telex designation "ROSPEC." Pet. App. 16a-17a.

SUMMARY OF ARGUMENT

The Nelsons allege that Saudi Arabia subjected them to treatment within that nation's borders that violates American standards of fairness and decency. The Nelsons' allegations of inhumane treatment, however, should not obscure the legal issue in

this case. The question is whether the FSIA confers jurisdiction over their suit. The court of appeals erred in concluding that the district court could exercise jurisdiction under the first clause of the FSIA's commercial activity exception, which allows adjudication of a suit against a foreign state that "is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

The first clause of the FSIA's commercial activity exception expressly requires that a plaintiff's action be "based upon"—and not merely related to—commercial activity carried on in the United States. In other words, the commercial activity must be the basis for the cause of action and not, for example, simply a link in the chain of events that led to an overseas injury. The question is not, as the court of appeals mistakenly believed, whether there is a "nexus" between the commercial activity and the plaintiff's injury. The question instead is whether the commercial activity provides the gist or gravamen of the complaint.

In this case, the Nelsons' complaint identifies the relevant commercial activity as Saudi Arabia's recruitment of Scott Nelson in the United States for overseas employment. Although Saudi Arabia's alleged recruitment is a commercial activity carried on in this country, it does not provide the basis for the Nelsons' intentional injury claims. The Nelsons do not contend that Saudi Arabia's recruiting activity was itself intentionally wrongful. Instead, they allege that it was a link in the causal chain that led to Scott Nelson's mistreatment in Saudi Arabia. Those allegations do not satisfy the "based upon" requirement.

The Nelsons also assert negligence claims that might be construed to allege that when Saudi Arabia

recruits persons in the United States for overseas employment, the foreign state must warn the prospective employees that Saudi law enforcement practices differ from American law enforcement practices. Although Saudi Arabia's alleged recruitment activity may provide the basis for such a claim, it is not clear that the claim would state a valid cause of action. That matter, however, is best addressed on remand after this Court clarifies that any negligence claim must be "based upon" and not simply causally related to the Saudi recruiting activity.

ARGUMENT

THE COURT OF APPEALS INCORRECTLY INTERPRETED THE FOREIGN SOVEREIGN IMMUNITIES ACT'S COMMERCIAL ACTIVITY EXCEPTION

Petitioners challenge the court of appeals' conclusion that the Nelsons' civil action for damages falls within the FSIA's commercial activity exception. The court reasoned that the Nelsons satisfied the first cause of the exception, because they alleged a factual relationship between Saudi Arabia's employee recruitment activity in this country and Scott Nelson's detention and alleged mistreatment in Saudi Arabia:

> In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia.

Pet. App. 15a. The precise content of the court's test, which it describes as a "nexus" requirement, *id.* at 12a, 13a, 16a, is unclear. The court of appeals' decision appears to require no more than that the commercial activity be a link in the chain of events

that leads to a plaintiff's injury, and it may require even less.[7]

Whatever its scope, the court of appeals' essentially ad hoc test rests on a misinterpretation of the FSIA. To fall within the first clause of the FSIA's commercial activity exception, a plaintiff must identify a commercial activity carried on by the foreign state in this country that is the basis for a valid cause of action. The Nelsons have failed to make such a showing in this case.

A. A Foreign State Is Subject To Suit In A United States Court If The Foreign State's Commercial Activity In This Country Is The Basis For A Cause of Action

The FSIA provides that "a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' unless one of several statutorily defined exceptions applies." *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1992) (emphasis omitted), quoting 28 U.S.C. 1604.

[7] The court of appeals seems to have reasoned that Scott Nelson was recruited in the United States for the job of "detecting and reporting safety violations," he was arrested "as a result of those actions," and his arrest and mistreatment therefore "resulted from and were directly attributable to [his] employment." Pet. App. 16a. The court of appeals also stated that Saudi Arabia's argument that Saudi officials arrested Nelson based on his submission of a forged diploma "in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction." *Ibid.* The court of appeals additionally concluded, however, that Royspec was subject to suit merely on the basis that Nelson was given Royspec's telephone number and he received four telegrams regarding his employment that bore a telex designation—"ROSPEC"—that is similar to Royspec's business name. *Id.* at 17a.

The Nelsons predicate their suit against petitioners on the first clause of the FSIA's commercial activity exception, which provides that a foreign state shall be subject to the jurisdiction of United States courts in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

To fall within that clause, the Nelsons must first establish that petitioners have "carried on" a "commercial activity" in the United States. The FSIA defines the term "commercial activity" to include "a regular course of commercial conduct or a particular commercial transaction or act," and it directs that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). See *Weltover*, 112 S. Ct. at 2165-2168. More particularly, the FSIA defines the phrase "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. 1603(e).

The Nelsons' allegations, taken as true, indicate that Saudi Arabia carried on only one pertinent commercial activity in the United States. According to the allegations below, Saudi Arabia entered into a contract with HCA (a non-Saudi corporation) to recruit individuals in this country for overseas employment at the Saudi-owned King Faisal Specialist Hospital. If Saudi Arabia utilized HCA as its agent, then Saudi Arabia effectively "carried on" that recruting activity in this country. See 1 Restatement (Second) of Agency § 1 (1958) (defining an agency

relationship).[8] Furthermore, the recruitment of hospital employees is a "commercial activity" within the meaning of the FSIA. HCA engaged in a recruitment activity no different than it might engage in for a private hospital, extending contractual offers of employment to perform health-care-related services. In light of those allegations, the court of appeals could conclude for purposes of petitioners' motion to dismiss that Saudi Arabia carried on a commercial activity in the United States.[9]

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[8] Under familiar principles of agency law, a principal may be liable for the actions of an agent empowered to act on the principal's behalf and under its control. See, *e.g.*, 1 Restatement (Second) of Agency § 144 (1958). Thus, if the foreign state employs an agent to conduct an activity in the United States on the foreign state's behalf, then the foreign state may be held to have "carried on" the activity itself. The court of appeals stated that the contract between Saudi Arabia and HCA "created an agency relationship." Pet. App. 11a. The district court, however, had not resolved that question, which it speculated "may be a pivotal factual issue in the related case" against HCA. *Id.* at 21a-22a.

[9] It is not so clear that the King Faisal Specialist Hospital has carried on a commercial activity in this country. As the court of appeals recognized, the Kingdom of Saudi Arabia—and not King Faisal Specialist Hospital—contracted with HCA to recruit employees for the hospital. Pet. App. 3a, 11a. See Notice of Filing in Support of Plaintiffs' Memorandum in Opposition to Defendant Royspec's Motion to Dismiss Complaint (S.D. Fla. June 29, 1989), Exh. 2 (agreement between the Royal Cabinet of the Kingdom of Saudi Arabia and HCA). The Nelsons contend that the hospital was also a party to the contract, see Resp. Reply Br. to U.S. Amicus Br. 7, but the contract was signed by a Saudi official on behalf of Saudi Arabia and simply identified the hospital as a recipient of HCA's services. Although Royspec apparently carries on commercial activity in the United States as purchasing agent for the hospital, that activity appears to have no relationship to the Nelsons' complaint. See p. 24 n.16, *infra*.

The mere fact that a foreign state has conducted commercial activity in this country, however, is not sufficient to satisfy the first clause of the FSIA's commercial activity exception. In addition, the suit against the foreign state must be "based upon" that activity. 28 U.S.C. 1605(a)(2). Applied according to its defined meaning, the term "based upon" requires that the foreign state's commercial activity be the "basis" for—and not merely related to—the cause of action. See *Webster's Third New International Dictionary* 180-181 (1986) (defining the verb "base"); accord *Random House Dictionary* 172 (1987). The specific language requires that the commercial activity provide the foundation for the plaintiff's action. See *Black's Law Dictionary* 128 (5th ed. 1979). The commercial activity must supply the "gist" or "gravamen" of the plaintiff's complaint. See *id.* at 620, 631; accord *Webster's Third New International Dictionary* 959, 992 (1986); *Random House Dictionary* 808, 833 (1987).[10]

The court of appeals therefore erred in concluding that the FSIA's "based upon" requirement is

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[10] See *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985). Some courts hold that the commercial activity must be an "element" of the claim. See *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 & n.3 (7th Cir. 1991) (claim is "based upon" events in the United States if those events establish a legal element of the claim, "almost always" the element of duty); *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). That formulation, however, is not entirely consistent with the statutory language. To satisfy the literal meaning of the "based upon" requirement, the commercial activity must provide the "basis"—the "foundation" or "fundamental ingredient"—of the cause of action. See *Webster's Third New International Dictionary* 182 (1986); accord *Random House Dictionary* 174 (1987).

satisfied if a causal "nexus" exists between the foreign state's commercial activity and the plaintiff's injury. A commercial activity is not the basis of a cause of action if the activity merely has a "connection" or "link" to *other* actions that provide the foundation or gist of the plaintiff's complaint. See *Webster's Third New International Dictionary* 1524 (1986) (defining "nexus"). If Congress had intended the conceptually different and far less significant relationship that the term "nexus" denotes, it would not have required that the action be "based upon" the commercial activity. Rather, it would have stated that the action must be "related to" or "in connection with" the commercial activity.[11]

Significantly, Congress routinely employs phrases such as "related to" or "in connection with," when that is what it means to say. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (holding that "a state law 'relates to' an

[11] Those courts that have equated the term "based upon" with a "nexus" requirement have confessed disdain for a "literal reading of the first clause." See, *e.g.*, *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 200, 202 (5th Cir. 1984). They have adopted the "nexus" test based on a policy judgment rather than any discernible principle of statutory construction. See *Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 582 n.10 (7th Cir.) (collecting cases), cert. denied, 493 U.S. 937 (1989); *Vencedora Oceanica*, 730 F.2d at 200-201 (same). The courts, however, are obligated to heed the literal meaning of the statute, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). This is not that sort of rare case.

employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan' "). Indeed, the second and third clauses of the commercial activity exception employ such terms. They state that a foreign state is not immune from suit in any case in which the action is based

> upon an act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a)(2) (emphasis added). See *Weltover*, 112 S. Ct. at 2164-2165. Congress understood the difference between a "based upon" and an "in connection with" requirement, and it drafted the commercial activity exception with apparent attention to the difference. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (construing "interest" as employed in RICO statute, 18 U.S.C. 1963(a)(1), in light of express restriction in neighboring provision).[12]

The plain import of the statutory language is sufficient by itself to reject the court of appeals' "nexus" test. See, *e.g.*, *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 575 & n.14 (1991); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). To the extent it is relevant, the FSIA's legislative history further

[12] Although the court of appeals improperly used the term "nexus" to describe the "based upon" requirement, the term is sometimes used to describe the FSIA's additional requirement of a relationship between a foreign state's commercial activity and the United States. Cf. G. Born & D. Westin, *International Civil Litigation in United States Courts* 369 (1989).

undermines that court's ruling. The Senate and the House Committees on the Judiciary prepared virtually identical reports on the FSIA. See S. Rep. No. 1310, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). The House Report states:

> Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the foreign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

H.R. Rep. No. 1487, *supra*, at 18-19. The examples given in the referenced analysis—"cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States" (H.R. Rep. No. 1487, *supra*, at 17)—all fall within the plain meaning of the term "based upon." In each example, the Report envisioned that the commercial activity—typically a contractual undertaking—would provide the gist of the complaint.[13]

[13] The Nelsons mistakenly suggest that our interpretation of the "based upon" requirement would deny jurisdiction in the case of a contract action "where all the negotiations on a loan agreement or other commercial contract took place in the United States, provided only that the contractual obligation ripened and the breach occurred elsewhere." Resp. Reply Br. to U.S. Amicus Br. 6. The Nelsons' objection is answered by the FSIA's broad definition of the term "commercial activity carried on in the United States," which includes activity "having substantial contact with the United States." 28 U.S.C. 1603(e). Under that definition, a contract that is negotiated in the United States with a private party may qualify as a "commercial activity carried on in the United States." A party could bring a lawsuit for breach of contract if the action is "based upon" the commercial activity—specifically, upon a contract having "a substantial contact" with this country.

The Report's discussion of the second clause of the commercial activity exception, which deprives a foreign state of immunity in cases "in which the action is based * * * upon an act performed in the United States in connection with commercial activity of the foreign state elsewhere," 28 U.S.C. 1605(a)(2), also is instructive. The Report notes that the first and second clauses overlap, but "it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad." H.R. Rep. No. 1487, *supra*, at 19. The Report was careful to note, however that

> the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

Ibid. The Report was referring to the limitation imposed by the "based upon" requirement, which appears in and limits equally all three clauses of the commercial activity exception.[14]

[14] The Nelsons attempt to explain away that passage by arguing, contrary to the usual axioms of statutory construction, that the term "based upon" should have a different meaning in the second clause. They contend that because the second clause does not require that the foreign state's com-

The court of appeals' "nexus" approach is also inconsistent with the rationale underlying the commercial activity exception. As this Court recently recognized, the commercial activity exception is an outgrowth of the "restrictive" theory of sovereign immunity, which draws a "distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other." *Weltover*, 112 S. Ct. at 2166. That theory posits that a foreign state is subject to suit based upon its commercial activities, because "[a] foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns'; rather, it 'exercise[s] only those powers that can also be exercised by private citizens.'" *Ibid.*, citing *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion). The FSIA preserves that distinction by allowing suits "based upon" commercial activity. The court of appeals' "nexus" approach, however, would effectively eliminate the distinction by allowing, under the commercial activity exception's first clause, suits challenging a foreign state's noncommercial acts. Under the court's rationale, a foreign state may be sued on any act, whatever its character and wherever its location, so long as the plaintiff alleges that the act has some connection or link to commercial activity in this country. The Nelsons' complaint, which invokes the commercial activity exception to sue a foreign state with respect to its arrest of an individual within the foreign state, illustrates the far-reaching consequences of that approach.

B. The Nelsons' Intentional Injury Claims Should Be Dismissed

The FSIA's commercial activity exception finds its most frequent use in contractual disputes between foreign states and private parties. Application of the "based upon" requirement presents no difficulties in that context. If a foreign state enters into a lawful contract that has a "substantial contact" with the United States, the foreign state may be subject to suit in an American court to enforce the contractual obligation. The foreign state's commercial undertaking gives rise to a legally enforceable obligation and provides the basis for a breach of contract action if the foreign state fails to perform as promised. The Nelsons, however, do not allege a breach of Scott Nelson's employment contract; instead, they allege that petitioners have committed various intentional wrongs.[15]

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mercial activity be carried on in the United States, Congress intended a "further restriction on access to American courts" in that context alone. Resp. Reply Br. to U.S. Amicus Br. 5. That hypothesis finds no support in either the language of the statute or the legislative history. The Nelsons also err in relying on a hearing witness's general statement about the FSIA, which they characterize as "the only statement in the legislative history of the FSIA that explains the meaning of the 'based upon' requirement." *Id.* at 6 n.7. Mr. Ristau simply observed that "[i]f a dispute arises as a result of an activity which a government carries on in this country, the most appropriate place to resolve such a dispute would be through the courts, which are, after all, designed to do just that: to resolve the dispute which has arisen here." *Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 29 (1973). That general observation does not "explain[] the meaning of the 'based upon' requirement." Resp. Reply Br. to U.S. Amicus Br. 6 n.7.

[15] Significantly, the employment contract (which is between King Faisal Specialist Hospital and Scott Nelson and provides for performance in Saudi Arabia) states that in the

The FSIA does not prohibit a plaintiff from invoking the commercial activity exception to obtain juristion over a foreign state in a tort action. Section 1605(a)(5) of the FSIA (which this Court has described as the exception for "noncommercial torts," *Argentine Republic*, 488 U.S. at 439) indicates by implication that the commercial activity exception may embrace tort suits. It provides an exception from immunity in specific tort actions "not otherwise encompassed in paragraph (2) above"—*viz.*, the commercial activity exception. See 28 U.S.C. 1605(a)(5). Thus, the FSIA contemplates that when a foreign state conducts a commercial activity, it is generally subject to the same types of tort suits that a private business would encounter. See also H.R. Rep. No. 1487, *supra*, at 17 (noting that the commercial activity exception encompasses actions based on "business torts occurring in the United States"). The requirements of the first clause of the FSIA's commercial activity exception remain the same. As in contract actions, the foreign state's commercial activity in this country must provide the basis for the cause of action.

The commercial activity involved here—Saudi Arabia's recruitment of Scott Nelson to work at its overseas hospital—does not provide a basis for the intentional injury and related spousal derivative claims that the Nelsons assert in their complaint. The Saudi recruiting activity provides the basis for

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case of any dispute arising from this contract, the Saudi courts, authorities, or commissions only will have jurisdiction. See Pet. App. 24a n.4. Such forum selection agreements are presumptively lawful. See *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The employment contract is attached as an exhibit accompanying an affidavit filed with Royspec's motion to dismiss the complaint for lack of jurisdiction. See Declaration of Ali S. Al-Shabrami (Mar. 1, 1989).

such claims only if the recruiting activity itself provides the gist of the Nelsons' cause of action. The Nelsons, however, do not allege that Saudi authorities intentionally injured Scott Nelson during the recruitment process or that they recruited him in this country with the intent to injure or imprison him. Instead, they base their intentional tort claims on wrongs allegedly committed against Scott Nelson during his employment in Saudi Arabia. For example, the battery count of the complaint states:

> 18. Defendant, SAUDI ARABIA, by and through its agents or employees, acting in their official capacity, did intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, strike and assault the body of [Scott Nelson], without his consent, and thereby cause great bodily harm, permanent disability, and permanent disfigurement.

Compl. ¶ 18. The gist of that claim is an intentional wrongful act in the foreign state—and not Saudi Arabia's recruitment activity in this country. The action is not "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

The Nelsons cannot cure that deficiency by arguing that the recruiting activity and what allegedly occurred in Saudi Arabia are causally "intertwined," Pet. App. 15a, or that "but for his recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries." *Id.* at 24a. The Nelsons' intentional tort claims must be "based upon," and not merely related to, commercial activity in this country. And because the recruitment activity does not provide a basis for the intentional

tort claims, it cannot support Vivian Nelson's related spousal derivative claims.[16]

C. The Nelsons' Failure To Warn Claim Against Saudi Arabia Should Be Remanded For Evaluation Under the Proper Standard

The same analysis applies to the Nelsons' negligence claims. Those claims are predicated upon petitioners' failure to warn Scott Nelson "of the hidden dangers associated with the employment." Compl. ¶¶ 14, 47, 67. Although the claim against Saudi Arabia may be based in part upon Saudi Arabia's alleged recruiting practices in this country, it is not clear that the claim states a valid cause of action.

When a foreign state conducts a commercial activity in this country, it must comply with federal and state laws governing the activity. Thus, if Saudi Arabia conducts recruitment activity in this country, it is subject to federal and state laws governing the

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[16] The Nelsons premise most of their intentional wrong claims against Saudi Arabia on United Nations declarations and covenants. See Compl. ¶¶ 19-33. The Nelsons fail to explain how those declarations and covenants give rise to a judicially enforceable cause of action. But there is no need to reach that issue, because those claims, like the battery count, fail in any event to satisfy the FSIA's "based upon" requirement. With respect to King Faisal Specialist Hospital, it appears that the hospital did not carry on any commercial activity in the United States. See note, 9, *supra*. There is accordingly no basis for suit against that entity. In the case of Royspec, its only involvement with Nelson was the provision of a telephone number that his family could use to reach him in the case of an emergency. That action plainly does not provide a basis for the causes of action alleged here. Cf. *Zedan*, 849 F.2d at 1513 (no jurisdiction provided under FSIA's commercial activity exception for action based on recruiting telephone call, as opposed to employment contract).

hiring of employees, including standards of conduct enforced through the common law of tort. If Saudi Arabia somehow breaches a duty of reasonable care in its recruitment activity, it may be subject to suit for negligence. See generally 2 Restatement (Second) of Torts §§ 281, 282, 298 (1965).

The Nelsons' negligence count against Saudi Arabia alleges that Saudi Arabia breached a duty of care in the following manner:

> 15. At the time it recruited and employed [Scott Nelson], as well as during the time [Scott Nelson] was reporting safety violations, SAUDI ARABIA knew or should have known that officials of the Saudi government, and officials of Saudi institutions such as [King Faisal Specialist Hospital], have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused without legal cause.
>
> 16. SAUDI ARABIA knew, or should have known, at the time it recruited and employed [Scott Nelson] that the employees and/or officials of the [King Faisal Specialist Hospital] would be likely to take severe retaliatory action against NELSON if he reported and/or attempted to remedy and/or disclose to others any health-related or other hazards or problems he discovered in [the hospital].
>
> 17. Despite SAUDI ARABIA's knowledge of the above factors, defendant did breach its duty of care to [Scott Nelson] in that it took no action to warn NELSON of the dangers of his job at [King Faisal Specialist Hospital], at the time it recruited him, at the time he began his employment, or at the time he was engaged in reporting the safety hazards at the hospital.

Compl. ¶¶ 15-17. That count seems to allege that Saudi Arabia was negligent in failing to warn Scott

Nelson that he would be intentionally abused for performing his job. If the Nelsons' legal theory is that an assailant has a duty to warn his victim before the assailant commits a battery, then their negligence claim should be dismissed as merely a formalistic recasting of their intentional tort claims into a failure to warn claim. Cf. *United States* v. *Shearer*, 473 U.S. 52, 59 (1985).

The Nelsons' allegations might be construed, however, to state a claim based on the theory that overseas employment recruiters generally are under an affirmative duty to warn prospective employees about overseas law enforcement practices. If the Nelsons assert that Saudi Arabia breached some such alleged duty of care when it recruited Scott Nelson, the Nelson's action could be "based upon" Saudi Arabia's recruiting activity. In that situation, Saudi Arabia's alleged recruiting activity would provide the basis for the claim. The question would remain, however, whether the law imposes a duty on overseas employment recruiters to warn about foreign law enforcement practices such that the Nelsons' claim would identify a valid cause of action under which the Nelsons would be entitled to relief.

The question whether the Nelsons' allegations state a valid negligence cause of action is best addressed on remand, after this Court clarifies that any negligence claim must be "based upon," and not simply causally related to, the Saudi recruiting activity. A determination whether the Nelsons' allegations state a negligence cause of action would require clarification of their claim, including what substantive law entitles them to relief. It is unclear from the complaint whether the Nelsons rely on the law of Florida or some other jurisdiction. Furthermore, it is unclear

whether the Nelsons would agree with our suggestion that their negligence claim is based on the theory that an overseas recruiter is under an affirmative duty to warn prospective employees about the law enforcement practices of the foreign state where the employee will work. A remand would allow the Nelsons to clarify those matters. The district court could then resolve whether the Nelsons have stated a valid cause of action that the FSIA would allow to go forward.

CONCLUSION

The decision of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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JULY 1992

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No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1991
CERTIORARI GRANTED JUNE 8, 1992

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August 11, 1989	Memorandum Opinion of the United States District Court for the Southern District of Florida
August 11, 1989	Order of the United States District Court for the Southern District of Florida Dismissing This Case for Lack of Subject-Matter Jurisdiction
September 11, 1989	Notice of Appeal by Plaintiffs Scott and Vivian Nelson from Order of Dismissal Entered August 11, 1989
February 21, 1991	Judgment of the United States Court of Appeals for the Eleventh Circuit and Order Reversing the Judgment of the United States District Court for the Southern District of Florida
February 21, 1991	Opinion of the United States Court of Appeals for the Eleventh Circuit
April 1, 1991	Petition for Rehearing and Suggestion of Rehearing In Banc
April 2, 1991	Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing En Banc
July 1, 1991	Order of the United States Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing and Suggestion of Rehearing In Banc

DATE FILED/ ENTERED	DOCUMENT
July 11, 1991	Mandate of the United States Court of Appeals for the Eleventh Circuit
July 19, 1991	Order of the United States Court of Appeals for the Eleventh Circuit Recalling and Staying Mandate Pending Petition for a Writ of Certiorari
September 26, 1991	Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit
November 18, 1991	Order of the United States Supreme Court Inviting the Solicitor General to File a Brief in this Case
May 18, 1992	Brief for the United States as Amicus Curiae
June 8, 1992	Order of the United States Supreme Court Granting Certiorari

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No: 88-1791-CIV-TES

SCOTT NELSON and VIVIAN NELSON, individually and as husband and wife,
Plaintiffs,

vs.

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, a Saudi hospital in Riyadh, Saudi Arabia, and ROYSPEC.
Defendants.

COMPLAINT

COME NOW the Plaintiffs, SCOTT NELSON and VIVIAN NELSON, by and through their undersigned attorney and sue the Defendant, SAUDI ARABIA, for compensatory damages, and the Defendants, KING FAISAL SPECIALIST HOSPITAL and ROYSPEC, for compensatory and punitive damages, and state as follows:

FACTUAL ALLEGATIONS AGAINST SAUDI ARABIA

1. This is a civil action for compensatory damages in excess of ten thousand dollars ($10,000.00).

2. This court exercises original jurisdiction over this matter, and the parties therein, pursuant to 28 USC § 1331, the Foreign Sovereign Immunity Act, 28 USCS § 1605 *et seq.*, the Florida Long Arm Statute, F.S. 48.181 *et seq.*, and the Alien Tort Statute, 28 USC § 1350.

3. Plaintiff, SCOTT NELSON, was and is at all times material hereto, *sui juris.*

4. Plaintiff, VIVIAN NELSON, was and is at all times material hereto, *sui juris*. At all times material hereto, VIVIAN NELSON, was and is the wife of Plaintiff, SCOTT NELSON, cohabiting together in a lawful marriage relationship.

5. Defendant SAUDI ARABIA, is a foreign state which does maintain and run the King Faisal Specialist Hospital (hereafter referred to as KFSH) located in Riyadh, Saudi Arabia; and which conducts through a separate legal person known as Royspec (and other agents), business activities in the United States including: employee recruitment, training and orientation, and execution of employment contracts, as well as contracts for insurance for the KFSH.

6. During November 1983, Plaintiff NELSON was recruited in Miami, Florida by Defendant or its agents, to fill the position of Monitoring Systems Engineer at KFSH. The function of this position is to inspect and monitor all hospital facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others.

7. On or about November 29, 1983, NELSON entered into a employment agreement in Miami, Florida with KFSH whereby NELSON would accept the position of Monitoring Systems Engineer at KFSH in Riyadh, Saudi Arabia. As part of said agreement, Defendant provided Plaintiff with a policy of insurance for major medical benefits.

8. On December 7, 1983, NELSON was flown to Riyadh, Saudi Arabia to commence his employment.

9. On or about March 20, 1984, while monitoring the KFSH facilities, in the course of his official duties, NELSON discovered safety hazards at the hospital.

10. Thereafter, Plaintiff repeatedly reported to hospital officials the above mentioned safety hazards and subsequently did report said safety hazards to a special in-

vestigative body of the Saudia Arabian Government, "The Royal Commission."

11. As a direct and proximate result of these actions, the Plaintiff was arbitrarily detained in Saudi Arabia against his will, despite his requests to be allowed to leave the country. He was summoned, on or about September 27, 1984, by agents or employees of KFSH to the hospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by agents or employees of SAUDI ARABIA; acting in their official capacity.

12. In total, NELSON was held captive for 39 days, during which time he was repeatedly interrogated, in Arabic, by police investigators, and was forced to sign Arabic papers, which were not translated to him. Further, Plaintiff was never advised of any charges nor accused of any crimes. Subsequent to his release, Plaintiff was again prevented, against his will, from leaving the country of Saudi Arabia.

13. During the 39 days in which Plaintiff, SCOTT NELSON, was held captive, he was held incommunicado, and his family was not advised of his whereabouts for several days. Once his wife, VIVIAN NELSON, was advised of his situation, she was informed by an agent of SAUDI ARABIA that he could be released in exchange for sexual favors.

COUNT I—NEGLIGENCE

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

14. As recruiter and/or employer of the Plaintiff, Defendant owed to the Plaintiff the duty to exercise due care to prevent injury to the Plaintiff, including the duty to adequately warn and instruct him of the hidden dangers associated with employment.

15. At the time it recruited and employed the Plaintiff, as well as during the time the Plaintiff was reporting safety violations, SAUDI ARABIA knew or should have known that officials of the Saudi government, and officials of Saudi institutions such as KFSH, have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause.

16. SAUDI ARABIA knew, or should have known, at the time it recruited and employed the Plaintiff, that the employees and/or officials of the KFSH would be likely to take severe retaliatory action against NELSON if he reported and/or attempted to remedy, and/or disclose to others any health-related or other hazards or problems which he discovered in KFSH.

17. Despite SAUDI ARABIA's knowledge of the above factors, Defendant did breach its duty of care to the Plaintiff in that it took no action to warn NELSON of the dangers of his job at KFSH, at the time it recruited him, at the time he began his employment, or at the time he was engaged in reporting the safety hazards at the hospital.

COUNT II—BATTERY

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

18. Defendant, SAUDI ARABIA, by and through its agents or employees, acting in their official capacity, did intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, strike and assault the body of the Plaintiff, SCOTT NELSON, without his consent, and thereby cause great bodily harm, permanent disability, and permanent disfigurement.

COUNT III—UNLAWFUL DETAINMENT

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

19. Article 13 of the International Bill of Human Rights, adopted by the United Nations General Assembly on the 10th day of December, 1948, states, in relevant portion:

> "Everyone has the right to leave any country, including his own, and to return to his country."

20. Defendant, SAUDI ARABIA, in prohibiting the Plaintiff from exiting the country, as was his legal right, has willfully and overtly breached said provision of international law.

COUNT IV—WRONGFUL ARREST AND IMPRISONMENT

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

21. Article 14 of the United Nation's International Covenant on Civil and Political Rights, adopted by the General Assembly on the 16th day of December, 1966 and entered into force on the 23rd day of March, 1976, establishes internationally accepted legal standards of care for those who stand accused of crimes. It states, in relevant portion:

> In the determination of a criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
>
> d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

22. By intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, restraining the Plaintiff against his will, by not providing an interpreter, or speaking to Plaintiff in a language he understood, by either not making the charges clear to him, or not making charges, and by compelling Plaintiff to sign statements which he could not understand, Defendant SAUDI ARABIA has willfully and overtly violated the responsibilities and duties of care which it owed to Plaintiff under said provision of international law.

COUNT V—INHUMAN TORTURE

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

23. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on the 9th day of December, 1975, defines torture as follows:

> ". . . torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.

24. Article 5 of the United Nation's International Bill of Human Rights, states:

> "No one shall be subjected to torture or to cruel, inhuman or degrading punishment."

25. Article 7 of the United Nation's International Covenant on Civil and Political Rights, states, in relevant portion: "No one shall be subjected to cruel, inhuman treatment or punishment."

26. The Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly on the 17th day of December, 1979, provides universally accepted minimum standards for officers of the law, and states, in relevant portion:

> Article 2: In the performance of their duty, law enforcement officials shall respect and maintain human dignity and maintain and uphold the human rights of all persons.
>
> Article 3: Law enforcement officials may use force only when strictly necessary and [only] to the extent required for the performance of their duty.
>
> Article 5: No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war, or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

27. In addition, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on the 10th day of December, 1984, both contain statements explicitly prohibiting the sort of treatment which was suffered by Plaintiff, SCOTT NELSON.

COUNT VI—DISRUPTION OF NORMAL FAMILY LIFE

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

28. Article 17 of the International Covenant on Civil and Political Rights states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

29. Under the definition of torture found in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Inhuman or Degrading Treatment or Punishment (see above) the solicitation of sexual favors from Plaintiff VIVIAN NELSON in exchange for her husband's freedom constitutes torture because it caused severe mental pain and anguish in an attempt to coerce her into an action. Further, this treatment was both clearly degrading and an arbitrary and unlawful attack and interference on the Plaintiffs' family life, honor and human dignity.

30. As such, Defendant's actions constitute a willful and overt breach of said provision of international law.

COUNT VII—MENTAL ANGUISH

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

31. Article 92 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations General Assembly on the 13th day of May, 1977, states:

> An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communication with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

32. In addition, the state of incommunicado imposed by the Defendant, SAUDI ARABIA, caused both Plaintiffs great mental anguish. Defendant's actions constitute a willful and overt violation of the responsibilities and duties of care which it owed to both Plaintiffs under international law.

33. As direct and proximate results of the Defendant's tortious acts or omissions and willful and overt violations of international law, as hereinabove alleged, Plaintiff SCOTT NELSON has suffered the following personal injury, damage to, or loss of property:

A. Permanent personal injury within a reasonable degree of medical probability.

B. Pain and suffering.

C. Permanent disability.

D. Significant permanent disfigurement.

E. Mental anguish, arbitrary and unlawful interference of normal family life, and attack upon his honor.

F. Loss of capacity for the enjoyment of life.

G. Loss of past and future earnings.

H. Hospital and medical bills for the treatment of his injuries.

COUNT VIII—DERIVATIVE CLAIM

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

34. At all times material hereto, Plaintiff, VIVIAN NELSON, was and is the wife of Plaintiff, SCOTT NELSON, cohabitating together in a lawful marriage relationship.

35. As direct and proximate results of the tortious acts, or omissions and violations of international law committed by the Defendant as hereinabove alleged, the Plaintiff, VIVIAN NELSON, has sustained the following damages:

A. Loss of support and services of her husband.

B. Loss of the care, comfort and society of her husband.

C. Loss of consortium.

D. Pain and suffering and mental anguish.

E. Arbitrary or unlawful interference of normal family life, and unlawful attack upon her honor as a married woman.

WHEREFORE, the Plaintiffs, SCOTT NELSON and VIVIAN NELSON, demand judgment against the Defendant, SAUDI ARABIA, for compensatory damages, exclusive of interest and costs, and demand a trial by jury of all issues so triable as of right.

FACTUAL ALLEGATIONS AGAINST KING FAISAL SPECIALIST HOSPITAL

36. This is a civil action for compensatory and punitive damages in excess of ten thousand dollars ($10,000.00).

37. This court exercises original jurisdiction over this matter, and the parties therein, pursuant to 28 USC § 1331, the Foreign Sovereign Immunity Act, 28 USCS § 1605 *et seq.*, the Florida Long Arm Statute, F.S. 48.181 *et seq.*, and the Alien Tort Statute, 28 USC § 1350.

38. Plaintiff, SCOTT NELSON, was and is at all times material hereto, *sui juris*.

39. Plaintiff, VIVIAN NELSON, was and is at all times material hereto, *sui juris*.

40. Defendant KING FAISAL SPECIALIST HOSPITAL (hereafter referred to as KFSH), a separate legal person and an agent, instrumentality and alter ego of the sovereign nation of Saudi Arabia. As a regular part of its business activities in the State of Florida and elsewhere in the United States, KFSH, through its agents, conducts commercial transactions including employee recruitment, advertising, employee training and orientation, and execution of employee contracts, as well as contracts for insurance.

41. During November 1983, Plaintiff NELSON, through published advertisement, was recruited in Miami, Florida by Defendant or its agents to fill the position of Monitoring Systems Engineer at KFSH. The function of this position is to inspect and monitor all hospital facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others.

42. On or about November 29, 1983, NELSON entered into an employment agreement in Miami, Florida with KFSH whereby NELSON would accept the position of Monitoring Systems Engineer at KFSH in Riyadh, Saudi Arabia. As part of said agreement, Defendant provided Plaintiff with a policy of insurance for major medical benefits.

43. On December 7, 1983, NELSON was flown to Riyadh, Saudi Arabia to commence his employment.

44. On or about March 20, 1984, while monitoring the KFSH facilities, in the course of his official duties, NELSON discovered safety hazards at the hospital.

45. Thereafter, Plaintiff repeatedly reported to hospital officials the above mentioned safety hazards and subsequently did report said safety hazards to a special investigative body of the Saudi Arabian Government, "The Royal Commission."

46. As a direct and proximate result of these actions, on or about September 27, 1984, Plaintiff was summoned by agents or employees of KFSH to the hospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by persons acting at the direction, instigation, provocation, instruction or request of Defendant.

COUNT IX—NEGLIGENCE

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

47. As recruiter and/or employer of the Plaintiff, Defendant owed to the Plaintiff the duty to exercise due care to prevent injury to the Plainitff, including the duty to adequately warn and instruct him of the hidden dangers associated with the employment.

48. At the time it recruited and employed the Plaintiff, as well as during the time the Plaintiff was reporting safety violations, KFSH knew or should have known that officials of the Saudi Government, and officials of Saudi institutions such as KFSH, have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause.

49. KFSH knew, or should have known, at the time it recruited and employed the Plaintiff, that the employees and/or officials of the KFSH would be likely to take severe retaliatory action against NELSON if he reported and/or attempted to remedy, and/or disclosed to others any health-related or other hazards or problems which he discovered in KFSH.

50. Despite KFSH's knowledge of the above factors, KFSH did breach its duty of care to the Plaintiff in that it took no action to warn NELSON of the dangers of his job at KFSH, at the time it recruited him, at the time he began his employment, or at the time he was engaged in reporting the safety hazards at the hospital.

COUNT X—BATTERY

The Plainitffs reaver each and every allegation as if fully set forth herein, and would further state:

51. Defendant, KFSH, by and through its agents or employees, did intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, strike and assault the body of the Plaintiff, SCOTT NELSON, without his consent, and thereby cause great bodily harm, permanent disability and permanent disfigurement.

52. As a direct and proximate result of the Defendant's malfeasance, as stated above, SCOTT NELSON, has sustained the following damages:

A. Permanent personal injury within a reasonable degree of medical probability.

B. Pain and suffering.

C. Permanent disability.

D. Significant permanent disfigurement.

E. Mental anguish, arbitrary or unlawful interference of normal family life, and unlawful attack upon his honor.

F. Loss of capacity for the enjoyment of life.

G. Loss of past and future earnings.

H. Hospital and medical bills for the treatment of his injuries.

COUNT XI—FALSE IMPRISONMENT

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

53. Defendant willfully, unlawfully, maliciously, recklessly, and with evil design intentionally completely restrained and imprisoned Plaintiff, NELSON, against his will; thereby depriving him of his liberty without probably cause or legal justification.

COUNT XII—DERIVATIVE CLAIM

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

54. At all times material hereto, Plaintiff, VIVIAN NELSON, was and is the wife of Plaintiff, SCOTT NELSON, cohabiting together in a lawful marriage relationship.

55. As direct and proximate results of the tortious acts or omissions of the Defendant as hereinabove alleged, the Plaintiff, VIVIAN NELSON, has sustained the following damages:

A. Loss of support and services of her husband.

B. Loss of the care, comfort and society of her husband.

C. Loss of consortium.

D. Pain and suffering and mental anguish.

E. Arbitrary or unlawful interference of normal family life, and unlawful attack upon her honor as a married woman.

WHEREFORE, the Plaintiffs, SCOTT NELSON and VIVIAN NELSON, demand judgment against the Defendant, KING FAISAL SPECIALIST HOSPITAL, for compensatory and punitive damages, exclusive of interest and costs, and demand a trial by jury of all issues so triable as of right.

FACTUAL ALLEGATIONS AGAINST ROYSPEC

56. This is a civil action for compensatory and punitive damages in excess of Ten Thousand Dollars ($10,000.00).

57. This court exercises original jurisdiction over this matter, and the parties therein, pursuant to 28 USC § 1331, the Foreign Sovereign Immunity Act, 28 USCS

§ 1605 *et seq.*, the Florida Long Arm Statute, F.S. 48.181 *et seq.*, and the Alien Tort Statute, 28 USC § 1350.

58. Plaintiff, SCOTT NELSON, was and is at all times material hereto, *sui juris.*

59. Plaintiff, VIVIAN NELSON, was and is at all times material hereto, *sui juris.*

60. Defendant ROYSPEC is a separate legal person and an agent, instrumentality and alter ego of the sovereign nation of Saudi Arabia and of the King Faisal Specialist Hospital (hereinafter referred to as KFSH) located in Riyadh, Saudi Arabia. Defendant ROYSPEC does maintain offices in Harmans, Maryland, and, as a regular part of its business activities in the State of Florida and elsewhere in the United States, ROYSPEC through its agents, conduct commercial transactions including employee recruitment, advertising, employee training and orientation, and execution of employee contracts, as well as contracts for insurance.

61. During November of 1983, Plaintiff NELSON, through published advertisement, was recruited in Miami, Florida by Defendant or its agents, to fill the position of Monitoring Systems Engineer at ROYSPEC. The function of this position is to inspect and monitor all hospital facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others.

62. On or about November 29, 1983, NELSON entered into an employment agreement in Miami, Florida with ROYSPEC whereby NELSON would accept the position of Monitoring Systems Engineer at KFSH in Riyadh, Saudi Arabia. As part of said agreement, Defendant provided Plaintiff with a policy of insurance for major medical benefits.

63. On December 7, 1983, NELSON was flown to Riyadh, Saudi Arabia to commence his employment.

64. On or about March 20, 1984, while monitoring the KFSH facilities, in the course of his official duties, NELSON discovered safety hazards at the hospital.

65. Thereafter, Plaintiff repeatedly reported to hospital officials the above mentioned safety hazards and subsequently did report said safety hazards to a special investigative body of the Saudi Arabian Government, "The Royal Commission."

66. As a direct and proximate result of these actions, on or about September 27, 1984, Plaintiff was summoned by agents or employees of ROYSPEC to the hospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by persons acting at the direction, instigation, provocation, instruction or request of Defendant.

COUNT XIII—NEGLIGENCE

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

67. As recruiter and/or employer of the Plaintiff, Defendant owed to the Plaintiff the duty to exercise due care to prevent injury to the Plaintiff, including the duty to adequately warn and instruct him of the hidden dangers associated with the employment.

68. At the time it recruited and employed the Plaintiff, as well as during the time the Plaintiff was reporting safety violations, ROYSPEC knew or should have known that officials of the Saudi Government, and officials of Saudi institutions such as KFSH, have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause.

69. ROYSPEC knew, or should have known, at the time it recruited and employed the Plaintiff, that the employees and/or officials of the KFSH would be likely to

take severe retaliatory action against NELSON if he reported and/or attempted to remedy, and/or disclosed to others any health-related or other hazards or problems which he discovered at KFSH.

70. Despite ROYSPEC's knowledge of the above factors, ROYSPEC did breach its duty of care to the Plaintiff in that it took no action to warn NELSON of the dangers of his job at KFSH, at the time it recruited him, at the time he began his employment, or at the time he was engaged in reporting the safety hazards at the hospital.

COUNT XIV—BATTERY

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

71. Defendant, ROYSPEC, by and through its agents or employees, did intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, strike and assault the body of the Plaintiff, SCOTT NELSON, without his consent, and thereby cause great bodily harm, permanent disability and permanent disfigurement.

72. As a direct and proximate result of the Defendant's malfeasance, as stated above, SCOTT NELSON, has sustained the following damages:

A. Permanent personal injury within a reasonable degree of medical probability.

B. Pain and suffering.

C. Permanent disability.

D. Significant permanent disfigurement.

E. Mental anguish, arbitrary or unlawful interference of normal family life, and unlawful attack upon his honor.

F. Loss of capacity for the enjoyment of life.

G. Loss of past and future earnings.

H. Hospital and medical bills for the treatment of his injuries.

COUNT XV—FALSE IMPRISONMENT

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

73. Defendant willfully, unlawfully, maliciously, recklessly, and with evil design intentionally completely restrained and imprisoned Plaintiff, NELSON, against his will; thereby depriving him of his liberty without probably cause or legal justification.

COUNT XVI—DERIVATIVE CLAIM

The Plaintiffs reaver each and every allegation as if fully set forth herein, and would further state:

74. At all times material hereto, Plaintiff, VIVIAN NELSON, was and is the wife of Plaintiff, SCOTT NELSON, cohabiting together in a lawful marriage relationship.

75. As direct and proximate results of the tortious acts or omissions of the Defendant as hereinabove alleged, the Plaintiff, VIVIAN NELSON, has sustained the following damages:

A. Loss of support and services of her husband.

B. Loss of the care, comfort and society of her husband.

C. Loss of consortium.

D. Pain and suffering and mental anguish.

E. Arbitrary or unlawful interference of normal family life, and unlawful attack upon her honor as a married woman.

WHEREFORE, the Plaintiffs, SCOTT NELSON and VIVIAN NELSON, demand judgment against the Defendant, ROYSPEC, for compensatory and punitive dam-

ages, exclusive of interest and costs, and demand a trial by jury of all issues so triable as of right.

JORGE A. DUARTE, P.A.
2503 Southwest 27th Avenue
Miami, FL 33133
(303) 285-2040

/s/ Jorge A. Duarte
JORGE A. DUARTE, ESQUIRE
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

DECLARATION

I, ALI S. AL-SHABRAMI, being first duly sworn upon my oath, do affirm and say:

1. I am over the age of 18 years, have personal knowledge of the facts stated herein, except as otherwise set forth, and am competent to be a witness. This declaration is submitted in support of ROYSPEC's motion to dismiss the above-referenced action and is not intended to waive any diplomatic or sovereign immunity conferred by law.

2. I am General Director of ROYSPEC Purchasing Services ("ROYSPEC"), a non-profit legal entity formed, owned and controlled by the government of Saudi Arabia to perform purchasing functions for the King Faisal Specialist Hospital and Research Center of Riyadh, Saudi Arabia. The name ROYSPEC is an abbreviation of "Royal Specialists." ROYSPEC has only one office in the United States located in Harmans, Maryland.

3. The King Faisal Specialist Hospital and Research Center has been in operation for approximately 15 years. It provides free services to government officials and to individuals with serious, often terminal diseases. The Hospital provides medical services such as cancer treatment, bone marrow transplants, and kidney dialysis and transplants. These services are provided to patients free of charge by the Saudi government.

4. The Hospital is wholly owned by the Kingdom of Saudi Arabia. It is governed by the Ministry of Health and the Royal Cabinet, and its budget is set and controlled by the Ministry of Finance.

5. ROYSPEC operates in Maryland and purchases supplies for King Faisal Specialist Hospital and Research Center. Physicians' requests for medical supplies and equipment are conveyed to Hospital administrators who, once the requests are approved, transmit a requisition to ROYSPEC in the United States. ROYSPEC purchases the requested items, checks them for accuracy and then ships them to the Hospital in Saudi Arabia. ROYSPEC usually purchases supplies by means of electronic and telephonic communication; thus its employees are not required to leave the office in Maryland.

6. ROYSPEC does not maintain an office nor have any employees in Florida. Nor does ROYSPEC engage in any regular and substantial course of commerce in Florida. ROYSPEC's sole contacts with Florida consist of occasional purchases of supplies through telephone or mail orders from businesses located in Florida. None of these contacts are in any way related to the claims asserted by Scott Nelson. ROYSPEC does not keep any bank accounts, property, inventory, warehouses or capital equipment in Florida, nor does it have a telephone listing or mailing address in that state.

7. The Plaintiff asserts that he was recruited in Florida by the Defendants or their agents. ROYSPEC, however, does not assume any responsibility for soliciting or contracting with new King Faisal Specialist Hospital and Research Center employees, such as Mr. Nelson. Such personnel recruiting and contracting in the United States are performed by Hospital Corporation of America Limited, pursuant to contract with King Faisal Specialist Hospital and Research Center.

8. ROYSPEC is not party to the Hospital Corporation of American contract governing recruiting and was not a party to the King Faisal Specialist Hospital and Research Center contract with Scott Nelson. A copy of the contract between Mr. Nelson and the Hospital, which was obtained from the files of the Hospital and not even available from ROYSPEC, is attached hereto as Exhibit 1.

9. ROYSPEC has not incorporated in Maryland or in any other state, nor does it intend to do so.

10. ROYSPEC enters into contracts and can sue and be sued in its own name.

11. ROYSPEC is not a general or managing agent of King Faisal Specialist Hospital and Research Center, nor is it authorized to receive service of process for the Hospital.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of March in Harmans, Maryland.

Date March 1, 1989 /s/ Ali S. Al-Shabrami
ALI S. AL-SHABRAMI, PhD

EXHIBIT 1

YOUR PASSPORT TO
INTERNATIONAL
OPPORTUNITIES

MONITORING SYSTEMS ENGINEER

The King Faisal Specialist Hospital and Research Centre in Riyadh, Saudi Arabia has an opening in the Engineering/Utilities Maintenance Department. This beautifully landscaped medical city located in the heart of the Kingdom is dedicated to providing the highest level of health care for the people of Saudi Arabia.

Monitoring Systems Engineer coordinates development, modification, planning, implementation, maintenance, and related technical activities associated with fire alarm/protection, HVAC, medical/radiation sensors, security and other monitoring/control systems. A B.S. in Electrical Engineering with strong practical knowledge of electrical/mechanical systems and facilities engineering is essential. Candidates must have five years engineering experience with at least two years in the design, modification, installation and maintenance of electronic monitoring and control systems. Honeywell Delta knowledge and large scale hospital related experience is desirable.

Persons interested in this position will be employed by, have a contract with, and work directly for the Government of the Kingdom of Saudi Arabia.

Commitments are for 24 months. Benefits are excellent and include free furnished housing, air transportation, 30 days paid annual leave, bonus pay, tax advantages and more.

For further information and/or to apply, please send resume to: Don Alexander, Senior International Representative, HCA International Company, P.O. Box 550, Nashville, TN 37202. An Equal Opportunity Employer.

EXHIBIT 2

King Faisal Specialist Hospital And Research Centre	Job Description

JOB TITLE:

Monitoring Systems Engineer — GRADE: 10

RESPONSIBLE TO:

Assistant Administrator, Utilities and Maintenance

BASIC FUNCTION:

Responsible for the development and expansion of electronic monitoring and control systems capabilities. Coordinates development, modification, planning, implementation, maintenance and related technical activities associated with fire alarm/protection, security, HVAC, medical/radiation sensors and other monitoring/control systems.

PRINCIPAL DUTIES:

Analyzes and evaluates existing systems. Identifies alternatives and solutions in accordance with budget, objectives and policies.

Recommends modifications of existing equipment and the purchase and installation of new equipment.

Coordinates technical activities with appropriate personnel to assure proper planning, specifications and installation of equipment and systems.

Plans, schedules and supervises maintenance activities. Establishes preventive maintenance program. Assures proper calibration and functioning of systems.

Supervises, trains and evaluates assigned technical/maintenance staff.

Organizes and maintains technical records, reports, plans, drawings, manuals, etc.

Interprets and implements rules and regulations. Provides technical guidance to users of systems and specialized sensors. Assures compliance with safety regulations.

Submit periodic reports on status and progress of activities.

Troubleshoots problems and implements corrective action.

Performs special projects and studies.

Performs any other duties as assigned.

EDUCATION:

B.S. in Electrical Engineering *preferred.* Strong practical knowledge of electrical/mechanical systems and facilities engineering is essential.

EXPERIENCE & OTHER QUALIFICATIONS

Five (5) years engineering experience with at least two (2) years in the design, modification, installation and maintenance of electronic monitoring and control systems, including fire alarm, security, HVAC/energy management and related systems is *required.* Honeywell Delta knowledge and large scale hospital related experience desirable.

Approved/Date 9 July 83
/s/ [Illegible]

Prepared by William R. Bufkins

JOB Code 016

Department Engineering/Utilities & Maintenance

EXHIBIT 3

OCT 23 1983 05014

HCA CORP NAS

201050 ROSPEC SJ

22 OCTOBER 1983

TLX. NO. 1549/31023

FOR: RUSSELL DICKINSON

FROM: ROGER L. GERARD/SANDY FAWCETT

REF: L-64010-01, UCL 8453, MONITORING SYSTEMS ENGINEER, UTILITIES/MAINT. SVCS.

APPROVAL MEMO UMD 3257 M SIGNED BY DR. FETEIH TO HIRE SCOTT NELSON AS GRADE 10, STEP 4, AGAINST THE ABOVE REFERENCED POSITION. ADDRESS IS AS FOLLOWS: 5651 WASHINGTON ST, A-10, HOLLYWOOD, FL 33023. MR. NELSON WILL BE RETURNING TO USA 25 OCT 83.

COPY OF APPROVAL MEMO WILL BE IN POUCH OF 23 OCT 83.

THANKS.

REGARDS.
SPECIALIST+

201050 ROSPEC SJI
HCA CORP NAS

REPLY VIA ITT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

DECLARATION

I, ALI S. AL-SHABRAMI, being first duly sworn upon my oath, do affirm and say:

1. I am over the age of 18 years, have personal knowledge of the facts stated herein, except as otherwise set forth, and am competent to be a witness. This declaration is submitted in support of ROYSPEC's motion to dismiss the above-referenced action and is not intended to waive any diplomatic or sovereign immunity conferred by law.

2. I have reviewed the opposition filed by the plaintiff in response to ROYSPEC's motion to dismiss the complaint against it. The plaintiff contends that ROYSPEC was a recipient of the documents attached as exhibits to his brief. These documents, which reflect communications between King Faisal Specialist Hospital and Hospital Corporation of America ("HCA") *do not* state or indicate in any way that copies of those documents were forwarded to ROYSPEC.

3. The plaintiff mistakenly contends that the reference to "ROSPEC SJ" contained on each of the exhibits is a reference to the defendant, ROYSPEC. That is absolutely incorrect. The letters "ROSPEC SJ" are used by King Faisal Specialist Hospital to identify its international telex number in Riyadh, Saudi Arabia. The telex number and telephone number reflected on those documents correspond to King Faisal Specialist Hospital, and

not *ROYSPEC*. ROYSPEC's telex number is 197528 and its telephone number is (301) 850-0100. To my knowledge, the stationery used in Plaintiff's Exhibit 5, identified by the plaintiff as "ROYSPEC's own stationery" is the stationery of King Faisal Specialist Hospital, located in Riyadh, Saudi Arabia, as the heading on the page clearly reflects. A copy of *ROYSPEC's* official stationery is attached hereto as Exhibit 1.

4. The plaintiff claims that my prior statement denying ROYSPEC's involvement in U.S. recruiting for the hospital "strains credulity" because the hospital does not have any other office in the U.S. The hospital does not need a U.S. recruiting office, however, because it has a contract with HCA vesting exclusive responsibility for recruiting in the U.S. Further, ROYSPEC does not have a contract with HCA because ROYSPEC recruits it own employees to work at ROYSPEC's office in the U.S.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 27th day of April in Washington, D.C.

4-27-89
Date

/s/ Ali S. Al-Shabrami
ALI S. AL-SHABRAMI, PhD

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

DECLARATION

I, HAMEED MANEJWALA, declare as follows:

1. I am over the age of 18 years, have personal knowledge of the facts stated herein except as otherwise set forth, and am competent to be a witness. This declaration is submitted in support of ROYSPEC's motion to dismiss the above-referenced action and is not intended to waive any diplomatic or sovereign immunity conferred by law.

2. I am the head of the Accounting Department for ROYSPEC Purchasing Services ("ROYSPEC") in Harmans, Maryland. I have been employed at ROYSPEC since December 10, 1980, and have at all times had first-hand familiarity with the activities and responsibilities of ROYSPEC in the United States.

3. Prior to 1979, Hospital Corporation of America ("HCA") was under contract to perform all of the recruiting and purchasing functions for King Faisal Hospital (the "hospital") in the United States. In 1979, the hospital created "ROYSPEC Purchasing Services" to assume responsibility for the purchasing function in the United States. The recruiting function was still reserved to HCA under contract, however.

4. Since I was employed by ROYSPEC in 1983 when the plaintiff alleges he was recruited for employment at the Hospital, I have first hand knowledge of the fact that ROYSPEC did not have any involvement in the recruiting or employment of Scott Nelson.

5. I also have knowledge that the initials "ROSPEC SJ" are used by the Hospital as the answer back code for the Hospital's telex machine. This code confirms that the caller has reached the correct number. The telex answer back code used by ROYSPEC is "ROYSPEC BAL".

6. ROYSPEC also has not had any agency or contractual relationship of any kind with Hospital Corporation of America at any time.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 28th day of April, 1989 in Washington, D.C.

/s/ Hameed Manejwala
HAMEED MANEJWALA
4/28/89

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

AFFIDAVIT OF SCOTT NELSON

STATE OF NORTH CAROLINA)
) ss
COUNTY OF WAKE)

COMES NOW Scott Nelson who being first duly sworn, deposes and says:

1. I am a Plaintiff in the above styled cause.

2. On December 6, 1983 I attended a pre-employment orientation held in Nashville, Tennessee wherein I, along with other attendees was told that in case of an emergency, family members residing in the United States should contact Royspec. The telephone number and location of Royspec was provided for use by family members in case of emergency.

3. At said orientation we were also informed by representatives of HCA that in case of an emergency Royspec would rapidly initiate the necessary communications with King Faisal Specialist Hospital in Riyadh, Saudi Arabia.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Scott Nelson
SCOTT NELSON

BEFORE ME, the undersigned authority, on the 20 day of May, 1989, personally appeared Scott Nelson who deposes and says that he has read the foregoing and it is true and correct to the best of his knowledge and belief.

/s/ [Illegible]
Notary Public

My commission expires: 9-6-89

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS

The Plaintiff, SCOTT NELSON, by and through his undersigned attorney, responds to the Request For Admissions of Defendant Hospital Corporation of America as follows:

1. Admitted.

2 Denied that Exhibit A was presented at the time of the employment application. Admitted that Exhibit A was submitted at some time thereafter.

3. Exhibit A was not presented in support of the employment application.

4. Denied.

5. Denied.

6. Admitted that Scott Nelson represented that he had received a degree from M.I.T. Denied that it was in support of his employment application.

7. Denied that Exhibit A was presented to support the employment application. Admitted that Nelson incorrectly represented that he had received a degree from M.I.T.

8. Denied as to HCA. Plaintiff is unable at the present time to either admit or deny his employment status with Defendant HCA International, being that the appropriate response thereto is dependent upon the legal

relationship between Defendant HCA and Defendant HCA International. Plaintiff has made a reasonable inquiry, and the information known or readily obtainable is insufficient to either admit or deny.

THIS IS TO CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of November, 1988 to: Kenny Nachwalter & Seymour, P.A., 400 Miami Center, 100 Chopin Plaza, Miami, Florida 33131-2305.

Respectfully submitted,

JORGE A. DUARTE, P.A.
2503 Southwest 27th Avenue
Miami, FL 33133
(305) 285-2040

/s/ Jorge A. Duarte, Esquire
JORGE A. DUARTE, ESQUIRE
Attorney for Plaintiffs

Dated: November 29, 1988
Miami, Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

REQUESTS FOR ADMISSIONS

Defendant Hospital Corporation of America, pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, hereby requests Plaintiffs Scott and Vivian Nelson to admit the truth of the matters enumerated below, for purposes of the present action only, within the time prescribed by Rule 36(a).

Definition

A document has been attached to this discovery request as Exhibit A. As used below, the term "Exhibit A" shall be defined to mean the original document of which Exhibit A is a photocopy (or a photocopy of a photocopy, etc.), any photocopy of that original document, any photocopy of a photocopy of that original document, and so on.

Requests for Admissions

1. That Exhibit A is not a genuine diploma conferred on Scott Nelson by the Massachusetts Institute of Technology.

2. That Scott Nelson presented Exhibit A in support of his application for employment as a Monitoring Systems Engineer at the King Faisal Hospital and Research Centre, either at the time of his application for that employment or at some time thereafter when he was asked for verification of his educational credentials.

3. That Scott Nelson knew that Exhibit A was a forgery at the time he presented it in support of his application for employment at the King Faisal Hospital and Research Centre.

4. That Exhibit A was forged at the direction of Scott Nelson.

5. That Exhibit A was forged by Scott Nelson.

6. That Scott Nelson falsely represented that he had received a degree from the Massachusetts Institute of Technology in support of his application for employment as a Monitoring Systems Engineer at the King Faisal Hospital and Research Centre.

7. That Scott Nelson presented a document in support of his application for employment at the King Faisal Hospital and Research Centre which purported to be either the original or a copy of a diploma given to him by the Massachusetts Institute of Technology and that to Scott Nelson's knowledge that document had been forged or falsified.

8. That Scott Nelson has never been employed by Defendant Hospital Corporation of America or by Defendant HCA International Company.

KENNY NACHWALTER &
SEYMOUR, P.A.
400 Miami Center
100 Chopin Plaza
Miami, Florida 33131-2305
Telephone: (305) 358-8151

Dated:
Nov. 2, 1988
Miami, Florida

By: /s/ Scott E. Perwin
JAMES J. KENNY
SCOTT E. PERWIN

Attorneys for Defendants
Hospital Corporation of
America and HCA
International Company

(Certificate of Service Omitted in Printing)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Massachusetts Institute of Technology

Upon the recommendation of the Faculty and
by authority vested in them the trustees have conferred on

Scott J. Nelson

the degree of

Bachelor of Science in Electrical Engineering

together with all the rights, privileges and honors thereunto appertaining
In Witness Whereof the seal of the Institute and the signatures
of the authorized officers are hereby affixed.

This Twentieth Day of May,
One Thousand Nine Hundred and Seventy Four

State of Florida
County of Broward
Date Aug 3, 1983
I certify this to be a true and exact
copy of the original document.
Shirley L Davis
Notary State of Florida

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES JULY 28 1985
BONDED THRU GENERAL INSURANCE UND.

Dean

President

KING FAISAL SPECIALIST HOSPITAL
AND RESEARCH CENTRE
RIYADH 11211
KINGDOM OF SAUDI ARABIA

مستشفى الملك فيصل التخصصي
ومركز الابحاث الطبية
الرياض - ١١٢١١
المملكة العربية السعودية

This agreement is made and entered into on the 24th day of SAFAR 1424 by and between:

First: King Faisal Specialist Hospital and Research Centre (hereinafter referred to as the "Hospital"), and,

Second: Scott Jeffrey Nelson (hereinafter referred to as "Employee").

It records the mutual understanding and the agreement of the two parties regarding the employment of the Employee by the Hospital under the following conditions:

حررت هذه الاتفاقية يوم _____ من شهر _____ بين كل من :-

أولا: مستشفى الملك فيصل التخصصي ومركز الأبحاث الطبية (المشار اليه فيما بعد بكلمة "المستشفى") و :

ثانيا: _____
(المشار اليه /اليها فيما بعد بكلمة "الموظف")

وقد اتفق الطرفان على أن يعمل الطرف الثاني موظفا بالمستشفى طبقا للشروط التالية :

1. NATURE OF WORK: The Employee shall work as Monitoring Systems Engineer and shall carry out other related duties as required by the Hospital.

١) طبيعة العمل : يعمل الموظف بوظيفة _____ وكل مايكلف به من أعمال متصلة بها.

2. SALARY: The Hospital shall pay to the Employee a monthly basic salary of SR 13,085. Such salary should be payable at the end of each Hejri month, in conjunction with other compensations and benefits set forth in Attachments "A" and "B".

٢) الراتب : يدفع المستشفى للموظف راتبا أساسيا في _____ قدره _____ ريالا سعوديا في نهاية كل شهر هجري وكذلك تعويضات ومميزات أخرى مذكورة في الملحقين "أ" و "ب".

3. POINT OF ORIGIN: The Employee's point of origin is designated as Ft. Lauderdale, FL USA. Riyadh will be considered the point of origin for all non-expatriate employees.

٣) نقطة المنشأ : تكون نقطة منشأ الموظف _____ وتعتبر مدينة الرياض نقطة المنشأ لجميع الموظفين المتعاقدين محليا.

4. DURATION OF CONTRACT: This contract shall be effective on 3 Rabi Al-Thani (7 DEC 83).

For an expatriate employee, the contract will be effective for a period of 24 months, unless employment is terminated earlier as provided herein.

٤) مدة العقد: يسري مفعول هذا العقد ابتداء من _____

ويكون نافذ المفعول لمدة ___ شهرا بالنسبة للموظفين المتعاقدين من خارج المملكة الا اذا تم انهاء خدمة الموظف قبل ذلك طبقا لما هو موضح فيما بعد.

8/12/83

The contract is renewed for subsequent periods based on mutual agreement of the Hospital and the Employee. Each renewal will be automatic and for a period of 12 months, unless the employee notifies the Hospital that the employee's intention is not to renew the contract, or if the Hospital notifies the Employee that the contract will not be renewed. Such notification will be in accordance with established Hospital policy. However, upon mutual agreement of the Hospital and the Employee, the employee's contract renewal period may be extended to either 24 or 36 months.

For a non-expatriate employee, the period of the contract will be unlimited, and may be terminated according to provisions set forth herein.

For a temporary or locum tenens employee, the contract will be effective for a period as set forth in Attachment "A" to this agreement.

It is further understood that the Employee will be on probation during the first ninety (90) days of his period of service.

5. WORK SCHEDULE: The regular work schedule for a full time employee will average 44 hours per week. The actual work days will be scheduled based on department operating requirements.

The regular work schedule for a part-time employee will not exceed 24 hours per week.

The Hospital may, at its discretion make revisions to the work schedule according to operational requirements.

6. TRANSPORTATION: The Hospital shall provide air transportation to the employee in the following instances:

a) From the employee's point of origin to the Hospital at the commencement of the contract, unless the employee is resident in the Kingdom of Saudi Arabia at the time of signing the contract.

ويحدد العقد لفترات لاحقة على أساس اتفاق متبادل بين المستشفى والموظف ويكون كل تجديد تلقائيا ولمدة اثني عشر شهرا الا اذا أبلغ الموظف أنه لا ينوي تجديد العقد ، أو اذا أخطر المستشفى الموظف بأن عقده لن يجدد . ويتم هذا الاخطار طبقا لسياسة المستشفى القائمة . غير أنه بناء على اتفاق متبادل بين المستشفى والموظف يمكن أن تمدد فترة تجديد العقد لتصبح أما أربعة وعشرين أو ستة وثلاثين شهرا .

أما بالنسبة للموظفين المتعاقدين محليا فان مدة عقودهم غير محددة ويمكن انهاؤها طبقا للنصوص المبينة فيما بعد .

أما بالنسبة للموظفين المؤقتين أو الذين يعينون لمدة محدودة بدلا من آخرين فان عقودهم سوف تكون كما هو مبين في الملحق "أ" من هذا العقد .

ومن المفهوم أيضا أن الموظف سيكون تحت التجربة خلال مدة التسعين يوما الأولى من مدة خدمته .

٥) أوقات العمل : يبلغ متوسط أوقات العمل العادية بالنسبة للموظفين الذين يعملون كل الوقت ٤٤ ساعة في الأسبوع . ويتم تنظيم أيام العمل المعينة على أساس متطلبات العمل في كل ادارة .

أما بالنسبة للموظفين الذين يعملون بعض الوقت فان أوقات العمل العادية لا تزيد على ٢٤ ساعة في الأسبوع .

على أن للمستشفى - وطبقا لما يراه - أن يعدل أوقات العمل طبقا لما تتطلبه احتياجات سير العمل .

٦) المواصلات : يؤمن المستشفى سفر الموظف بالطائرة في الحالات التالية :

أ) من نقطة منشأ الموظف الى المستشفى عند بداية مدة العقد مالم يكن مقيما بالمملكة عند توقيع العقد .

b) From the Kingdom to the employee's point of origin and return upon annual leave.

ب) من المملكة الى نقطة منشأ الموظف وايابا عند الاجازة السنوية.

c) From the Kingdom to the employee's point of origin upon final termination of services.

ج) من المملكة الى نقطة منشأ الموظف عند نهاية خدمته.

Transportation will be provided according to Hospital policy for eligible dependents as reflected in Attachments "A" and "B".

ويؤمن المستشفى السفر بالطائرة لمرافقي الموظف المعتمدين كما هو موضح في الملحقين "أ" و "ب".

7. HOUSING ALLOWANCE: The Hospital, at its option, and due to operational requirements, shall provide housing accommodations to the Employee. In this case, the monthly Basic Housing Allowance shown in Attachment "A" to this Agreement shall be deducted from total compensation as rental payment. However, the Employee may be permitted to lease non-Hospital accommodations. In this case, the Employee shall be paid a Special Housing Allowance in accordance with Hospital policy.

٧) بدل السكن: يقوم المستشفى، حسبما يتراءى له وحسب متطلبات العمل، بتوفير السكن للموظف. وفي هذه الحالة فان بدل السكن الشهري الأساسي المبين في الملحق "أ" من هذا العقد يتم حسمه من مجموع مستحقاته نظير الايجار. ويجوز السماح للموظف أن يستأجر مسكنا لايملكه المستشفى. وفي هذه الحالة يدفع المستشفى للموظف بدل سكن خاص وفقا لسياسة المستشفى.

8. LEVIES AND TAXES: The Employee shall be subject to levies and taxes imposed by the Saudi Arabian Government on his income. Such levies and taxes will be deducted from the Employee's salary and benefits in accordance with provisions of applicable regulations.

٨) الرسوم والضرائب: يخضع الموظف للرسوم والضرائب التي تفرضها الحكومة السعودية على دخله. وسوف يقوم المستشفى بخصمها من مرتبه وعوائده طبقا لنصوص اللوائح والنظم السارية.

The Hospital shall pay the dues and taxes imposed on expatriate employees in connection with Hospital sponsored travel, as well as those relating to the Employee's work permit and residency in the Kingdom of Saudi Arabia.

وسوف يدفع المستشفى الرسوم والضرائب المفروضة على الموظفين المتعاقدين من الخارج فيما يتعلق بالسفر الذي يكفله المستشفى وكذلك فيما يتعلق بتصاريح عمل الموظف واقامته في المملكة العربية السعودية.

9. MEDICAL REQUIREMENTS: The Employee and all medically eligible dependents shall be obliged to meet all medical standards set forth by the Hospital, including a medical questionnaire, physical examination, inoculations and other specialized medical requirements that may be established from time to time by the Hospital.

٩) المتطلبات الطبية: يخضع الموظف وجميع مرافقيه الذين يحق لهم تلقي الرعاية الطبية لتنفيذ كل ما يقرره المستشفى بشأن العناية الطبية.

10. WORK-RELATED DISABILITY: In the event of death, an injury or disease sustained by the Employee during or due to work, the Hospital will pay compensation according to Hospital policy.

11. NON WORK-RELATED DISABILITY: In the event that the employee is unable to work due to non work-related disability, the employee is eligible to receive sick leave up to thirty (30) days as full pay and sixty (60) days at three-quarters pay during any one service year.

12. MATERNITY LEAVE: A female employee may be granted maternity leave up to forty-five (45) days during a service year, according to Hospital policy.

Temporary, Locum Tenens, and part-time employees will not be entitled to maternity leave.

13. ANNUAL LEAVE: The employee shall be entitled to annual paid leave at the rate of thirty calendar days per year of service. The employee shall be eligible for such leave after completion of the first twelve months of service.

Annual leave or pay in lieu thereof shall be scheduled according to work requirements and Hospital policy.

14. DISCIPLINARY PROCEDURES: In the event that the employee commits an infraction of the rules, regulations and policies of the Hospital, the employee will be subject to disciplinary procedures, according to the seriousness of the infraction. Such disciplinary procedures are:

a) Warning

b) Suspension without pay

c) Termination of employment

بما فيها الاجابة على كل الاستفسارات الطبية وعمل الفحوص الطبية والتطعيم ضد الأمراض المختلفة واجراء كافة الفحوص الطبية التخصصية التي قد يجريها المستشفى من وقت لآخر .

١٠) العجز بسبب اصابة العمل : اذا توفى الموظف أو أصيب باصابة أو مرض أثناء العمل أو بسببه فان المستشفى يدفع له تعويضا طبقا لنظام المستشفى.

١١) العجز بسبب اصابة لاتتعلق بالعمل : في حال عدم تمكن الموظف من العمل نتيجة عجز لاعلاقة له بالعمل يمنح الموظف اجازة مرضية تصل الى ثلاثين (٣٠) يوما براتب كامل، وستين (٦٠) يوما أخرى بثلاثة أرباع الأجر وذلك خلال كل سنة من سنوات الخدمة .

١٢) اجازة الوضع : تمنح الموظفة اجازة وضع تصل الى خمسة واربعين (٤٥) يوما خلال أي سنة من سنوات الخدمة ، طبقا لنظام المستشفى .

أما الموظفات المؤقتات أو المراسلات أو العاملات بدوام جزئي فلا يحق لهن اجازة وضع .

١٣) الاجازة السنوية : يستحق الموظف اجازة سنوية مدتها ثلاثون يوما براتب كامل عن كل سنة خدمة . ويعتبر الموظف مستحقا لهذه الاجازة بعد اتمام الاثني عشر شهرا الأولى من الخدمة .

ويتم ترتيب الاجازة السنوية أو التعويض عنها طبقا لمتطلبات العمل ولسياسة المستشفى .

١٤) الاجراءات التأديبية : اذا ارتكب الموظف ما يخل بالنظم واللوائح والسياسة المتبعة في المستشفى فانه يتعرض لاجراءات تأديبية تبعا لخطورة المخالفة التي ارتكبها . وهذه الاجراءات التأديبية هي :-

أ) الانذار

15. TERMINATION OF EMPLOYMENT: Employee's service under this agreement may be terminated in any of the following ways:

a) Probationary Termination

The Hospital shall have the right within the probationary period to terminate Employee's service. In such cases, the agreement will be terminated without prior notice or severance benefit.

b) Dismissal

The Hospital may terminate the Employee's services hereunder at any time based on poor job performance or infraction(s) of the rules, regulations and policies of the Hospital, by giving him written notice at least thirty (30) days prior to the effective date of such termination. The Hospital may at its option, pay to the Employee an amount equivalent to thirty (30) days of salary in lieu of such notice.

c) Discharge for Cause

The Hospital may cancel this agreement without prior notice if it is established that the Employee has committed any of the infractions set forth in Hospital rules, regulations and policies as warranting immediate termination. Such infractions include, but are not limited to, possession of arms, explosives, narcotics or liquor, theft, intentional or malicious destruction of Hospital property, resorting to forgery to obtain employment, absent without valid reason for more than twenty (20) days in any service year, or more than ten (10) consecutive days, assaulting a supervisor or committing an immoral act.

d) Resignation

The Employee may at any time terminate this agreement by submitting a written resignation to the Hospital. An

ب) الاعفاء من العمل بدون اجر .

ج) انهاء الخدمة .

١٥) انهاء الخدمة: قد يتم انهاء خدمة الموظف وفقا لهذا العقد بأحد الأشكال الآتية :

أ) انهاء الخدمة أثناء فترة الاختبار:

للمستشفى الحق خلال فترة الاختبار في انهاء خدمة الموظف . وفي مثل هذه الحالات ، يتم انهاء الاتفاق بدون اخطار مسبق أو صرف فوائد نهاية الخدمة .

ب) الفصل من الخدمة :

يمكن للمستشفى انهاء خدمة الموظف في أي وقت بسبب ضعف أدائه لعمله أو ارتكابه لمخالفة أو مخالفات لنظم ولوائح وسياسة المستشفى، وذلك بتوجيه اخطار كتابي له قبل ثلاثين (٣٠) يوما على الأقل من تاريخ نفاذ انهاء الخدمة . وللمستشفى وفقا لما يراه ، أن يدفع للموظف مبلغا يعادل ثلاثين (٣٠) يوما من راتبه بدلا من ذلك الاخطار.

ج) الفصل لسبب :

يحق للمستشفى الغاء هذا العقد بدون اخطار مسبق اذا ما ثبت أن الموظف قد قام بارتكاب أية مخالفات واردة في لوائح ونظم وسياسة المستشفى مما يستلزم الانهاء الفوري للخدمة . وتشمل تلك المخالفات على سبيل المثال وليس على سبيل الحصر حيازة الأسلحة والمتفجرات والمخدرات والمشروبات الروحية والسرقة والتخريب المتعمد الذي يضر بممتلكات المستشفى واللجوء الى التزوير للحصول على الوظيفة، والتغيب بدون عذر مقبول لمدة تزيد على عشرين (٢٠) يوما في خلال أي سنة من سنوات الخدمة . أو لأكثر من عشرة (١٠) أيام متتالية . أو الاعتداء أو التهجم على رئيسه المباشر أو ارتكاب عمل فاضح أو مخل بالآداب العامة .

د) الاستقالة :

يمكن للموظف أن يقوم في أي وقت بانهاء هذا العقد بتقديم استقالة مكتوبة الى المستشفى.

expatriate will be required to give written notice at least sixty (60) days prior to the effective date of such termination.

Non-expatriate employees will be required to give written notice at least thirty (30) days prior to the effective date of such termination.

The Hospital may, at its discretion, exempt the employee from all or a portion of the above requirements concerning notice.

The employee will be eligible to receive termination benefits in accordance with applicable rules, regulations and policies of the Hospital.

e) Reduction in Force

The Hospital may at any time terminate the Employee's services hereunder, when, in the sole judgement of the Hospital, the employee's position is no longer required. In such instances, the Hospital shall give a minimum of sixty (60) days notice of such termination.

The Hospital may at its option, pay to the employee an amount equivalent to sixty (60) days total compensation in lieu of such notice.

f) Medical Discharge

In the event of the employee's death, his total incapacitation for performing assigned work, or illness resulting in absence from work for a period of ninety (90) consecutive days or a total of one hundred and twenty (120) days during any one service year, employee's services hereunder shall automatically come to an end.

16. SEVERANCE BENEFIT: Upon final termination of this agreement, the employee shall be entitled to severance benefit in accordance with provisions of Hospital rules, regulations and policy.

ويتحتم على الموظف المتعاقد بعقد خارجي تقديم اخطار كتابي قبل ستين (٦٠) يوما من تاريخ نفاذ الاستقالة.

وعلى الموظف المتعاقد بعقد داخلي تقديم اخطار كتابي قبل ثلاثين (٣٠) يوما من تاريخ نفاذ الاستقالة.

ويمكن للمستشفى وفقا لما يراه اعفاء الموظف من جميع أو بعض المتطلبات السابقة الخاصة بالاخطار.

ويستحق الموظف الحصول على مكافآت نهاية الخدمة بما يتفق مع القواعد واللوائح والسياسة المطبقة بالمستشفى.

هـ) تخفيض القوة العاملة:

قد يقوم المستشفى بالاستغناء عن خدمات الموظف في أي وقت بموجب هذا العقد عندما يتضح أنه - وفقا للقرار الذي يقوم المستشفى منفردا باتخاذه - لم تعد هناك حاجة للوظيفة التي يشغلها هذا الموظف وفي مثل هذه الحالات سيقوم المستشفى بتوجيه اخطار للموظف مدته ستين(٦٠) يوما قبل انهاء خدمته.

ويمكن للمستشفى، وفقا لما يتراءى له، أن يدفع للموظف مبلغا يعادل ستين(٦٠) يوما كمكافأة شاملة بدلا من ذلك الاخطار.

و) العمل لأسباب طبية:

في حالة وفاة الموظف أو عجزه التام عن القيام بأداء العمل المكلف به أو اصابته بمرض ينتج عنه التغيب عن العمل لمدة تسعين (٩٠) يوما متصلة أو ما يصل مجموعه الى مائة وعشرين (١٢٠) يوما خلال أي سنة من سنوات الخدمة، فانه سيتم اعتبار خدمات الموظف المذكور منتهية تلقائيا.

ز) مكافأة نهاية الخدمة: عند انهاء هذا العقد بصفة نهائية، يحق للموظف الحصول على مكافأة نهاية الخدمة طبقا للأحكام التي تنص عليها لوائح ونظم وسياسة المستشفى.

17. COMPLETION OF SERVICE YEAR BONUS: Upon completion of the second and each subsequent service year, an expatriate employee shall be eligible to receive a completion of service year bonus, equivalent to one month's basic salary in effect at the completion of that service year. Such bonus shall be exclusive of the first year of Hospital service.

In certain cases of terminations prior to the completion of the contract, a pro-rata portion of the completion of service bonus will be paid according to the rules, regulations and policies of the Hospital.

١٧) منحة اتمام سنوات الخدمة :

عند اتمام السنة الثانية من الخدمة وفي نهاية كل سنة من سنوات الخدمة التالية يستحق الموظف المتعاقد من الخارج الحصول على منحة اتمام سنة الخدمة بما يعادل شهرا واحدا من راتبه الأساسي الجاري عند تمام تلك السنة ، وذلك باستثناء سنة الخدمة الأولى بالمستشفى .

وفي بعض حالات انتهاء الخدمة قبل اتمام مدة العقد سيتم دفع نسبة تتمشى مع معدل ما قضاه من فترة الخدمة كمنحة وذلك وفقا لنظم ولوائح وسياسة المستشفى .

18. LOCUM TENENS, TEMPORARY AND PART-TIME EMPLOYEES: The benefits and compensation afforded to Locum Tenens, Temporary and Part-Time employees are limited to these set forth in Attachment "A" or "B" pertaining to salary, monetary allowances, work related disabilities, sick leave and medical care. No other benefits or privileges set forth elsewhere in this contract are applicable to these employees. Regarding this type of employee, the Hospital shall have the right to terminate the Employee without prior notice or severance pay.

١٨) الموظفون "المنتدبون" لفترة محددة والموظفون المؤقتون والعاملون لبعض الوقت : تنحصر الفوائد والمستحقات التي يحصل عليها المنتدبون لفترة محددة والموظفون المؤقتون والموظفون الذين يعملون بعض الوقته على ما هو مبين في ملحقي "أ" أو "ب" فيما يتعلق بالرواتب والبدلات النقدية والعجز الناتج عن اصابات العمل والاجازات المرضية والرعاية الطبية . وفيما عدا ذلك فلا تنطبق أية فوائد أو امتيازات مما تكون قد وردت في مكان آخر من هذا العقد على أولئك الموظفين . وفيما يتعلق بهذا النوع من الموظفين فان للمستشفى الحق في انهاء خدمة الموظف بدون اخطار مسبق أو صرف أية فوائد خدمة .

19. PASSPORTS: The Employee will, for the duration of the Employee's stay in the Kingdom, present the Employee's (and resident dependents, if applicable) passport to the Hospital for safekeeping for processing and reneval of residence and work permits, for visa processing and security requirements.

This does not in any way restrict the Employee's ability to obtain the passport whenever it is deemed necessary.

١٩) الجوازات: على الموظف طوال مدة اقامته بالمملكة تسليم جواز السفر الخاص به (وكذلك جوازات سفر مرافقيه المعتمدين والمقيمين) الى المستشفى لحفظه وللقيام باجراءات تجديد الاقامة وتصاريح العمل والحصول على التأشيرات وكذلك لدواعي الأمن .

وهذا لايمنع الموظف باي حال من الأحوال من الحصول على جواز سفره كلما دعت الضرورة الى ذلك .

20. APPLICABLE CALENDAR: All times and dates set forth herein shall refer to the Hejri Calendar.

٢٠) التقويم الذي يتم تطبيقه : يجري حساب جميع المواعيد والتواريخ الواردة هنا على أساس التقويم الهجري .

21. MARRIED STATUS: An Employee granted married status will lose the benefits offered by such status if the Employee's spouse fails to meet the residency requirements during the Employee's service year.

٢١) الموظف بعقد متزوج: يفقد الموظف بعقد متزوج المزايا التي توفرها له هذا العقد اذا لم تستمر اقامة زوجه معه وفقا لشروط تلك الاقامة أثناء أي سنة من سنوات الخدمة.

22. APPLICABLE REGULATIONS: This contract is subject to the conditions, rules, regulations and policies of the Hospital. The provisions and benefits set forth in Attachments "A" and "B" to this agreement are considered as part of the contract. The application form, duly signed by the Employee and the Hospital will constitute an agreement to accept the changes as specified therein.

٢٢) النظم واللوائح المطبقة: يخضع هذا العقد لجميع الشروط واللوائح والنظم والسياسة التي تتبعها المستشفى. وبعد ما ورد في الملحقين "أ" و "ب" بخصوص الشروط والمستحقات جزءا لايتجزأ من العقد، وسيعتبر نموذج طلب الاستخدام الذي قام كل من الموظف والمستشفى بالتوقيع عليه، اتفاقا على قبول التغييرات التي يتم تحديدها في هذا السياق.

23. CONTRACT DISPUTES: In the case of any dispute arising from this contract, the Saudi courts, authorities or commissions only will have jurisdiction.

٢٣) الإختصاص بنظر المنازعات: تختص المحاكم والسلطات واللجان السعودية دون غيرها بنظر أي نزاع قد ينشأ من هذا العقد.

This Agreement in Arabic and English has been executed in two (2) copies, the parties hereto both retaining a copy and intending both copies to serve as duplicate originals of this agreement.

وقد تم تحرير هذا العقد الصادر باللغتين العربية والانجليزية من نسختين (٢) تسلم كل من الطرفين المعنيين بنسخة وتعتبر كلاهما نسختين أصليتين من هذا العقد.

King Faisal Specialist Hospital and Research Centre	Date	التاريخ	مستشفى الملك فيصل التخصصي ومركز الأبحاث الطبية
11/21/93		11/30/93	

Employee — الموظف

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1791-CIV-NESBITT

SCOTT NELSON and VIVIAN NELSON,
individually and as husband and wife,
Plaintiffs,

v.

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL,
A Saudi hospital in Riyadh, Saudi Arabia, and ROYSPECT,
Defendants

Case No. 88-0484-CIV-NESBITT

SCOTT NELSON and VIVIAN NELSON,
individually and as husband and wife,
Plaintiffs

v.

HOSPITAL CORPORATION OF AMERICA;
and HCA INTERNATIONAL COMPANY,
Defendants

DECLARATION OF FREDERICK G. DUTTON

I, Frederick G. Dutton, declare as follows:

1. I am an attorney in the firm of Dutton & Dutton, PC, 1140 Connecticut Avenue, N.W., Suite 801, Washington D.C. 20036, and am admitted to the Bar in California and the District of Columbia. I am now a resident of Washington D.C. The information set forth herein is based on my personal and first hand knowledge except as otherwise stated. I am competent to testify concerning the matters set forth herein.

2. For over ten years, I have acted as attorney for the Royal Embassy of the Kingdom of Saudi Arabia in the United States. I have been requested by the Embassy to advise and safeguard its interest and the interest of the Kingdom of Saudi Arabia as to the above-referenced action.

3. For over two years, the Embassy has been involved off and on in discussions with Scott Nelson concerning claims of alleged mistreatment in Saudi Arabia and has offerred to arrange for him to pursue those claims in the courts and/or administrative channels of Saudi Arabia. Mr. Nelson has been assured by the Embassy that he and/or his counsel, ast his option, would be issued visas and guaranteed safe passage to seek redress through the Saudi administrative and/or legal system. Mr. Nelson has never accepted that offer nor acted on it with the Embassy. I have been authorized to represent that the Kingdom continues to be ready to work with the U.S. Embassy as well as the plaintiffs and their counsel to effectuate this offer on an impartial and entirely secure, safe basis.

4. I am also aware that the issues raised by Nelson's complaint have been the subject of continuing discussions among diplomatic officials of the United States and the Kingdom of Saudi Arabia. I have also been requested to state that the Kingdom believes that adjudication of the plaintiffs' claims in the courts of the United States would pose an interference with this diplomatic process as well as adjudication of the matter in the legal system of Saudi Arabia, which is the proper and available forum for considering the facts and merits involved in the Nelson claims.

Executed this 23rd day of June, 1989.

/s/ Frederick G. Dutton
FREDERICK G. DUTTON

PROBLEMS CONFRONTING AMERICAN BUSINESSMEN IN SAUDI ARABIA

HEARING

BEFORE THE

SUBCOMMITTEE ON

EUROPE AND THE MIDDLE EAST

OF THE

COMMITTEE ON FOREIGN AFFAIRS

HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

June 15, 1987

Printed for the use of the Committee on Foreign Affairs

STATEMENT OF SCOTT NELSON, DAVIE, FL, FORMER EMPLOYEE OF HOSPITAL CORPORATION OF AMERICA

Mr. NELSON. I would like to thank the Chairman and the committee for this opportunity to shed some light on the treatment of Americans in Saudi Arabia. In September '83 I was employed by Bechtel Petroleum Company as a senior electrical engineer. I saw an ad in a periodical for Hospital Corporation of America looking for a monitoring systems engineer in Saudi Arabia, King Faisal Specialist Hospital and Research Center. I applied for the job and received it.

My problems began when, as part of my job requirements, I discovered a dangerous grease valve in the oxygen and nitrous oxide lines at the King Faisal Hospital. These were not only a fire hazard, but were endangering patients' lives in that all lines that connected to these valves were contaminated, thus endangering the patients' lives.

During the period of March through August of 1984 I reported this discovery to every level of the King Faisal Specialist Hospital (KFSH), including the Royal Commission, which was already investigating wrongdoings at KFSH. Each department level, rather than taking any kind of action, tried to cover up and ignore this dangerous situation. I was instructed to ignore the problem.

After having reported my discoveries, the harassment became so malicious and relentless that in June of 1984 I tried to resign. During this period I contacted a Ms. Stephanie Smith and Mr. Jim Bigges, U.S. Embassy Agents. I told them about my situation and that KFSH was refusing me, my wife and son our passports so we could leave the Kingdom. I also called the State Department in D.C. and spoke to a Ms. Hobgood. She told me that all she could do was file a report on the problem. In September I again tried to submit my resignation to

Security, Management, and the Royal Commission, but the hospital refused acceptance of my resignation, and refused again to return my passport.

On September 27, 1984, I was summoned to Security by Mr. Kareem. I was met there by two investigators who wanted to interview me for a few minutes. Neither investigator spoke English. I was then taken to the Criminal Investigation Division, CID. There, in a small cell, a man put me in foot shackles and pushed me to the floor. Four men then entered the cell; one man slapped me in the face, breaking my glasses. Another then punched me in the back of the neck and lower back. Two of the men held my feet while another pulled my shoes off and beat my feet with bamboo canes approximately ¼ inch in diameter. The beatings had commenced.

I was punched, kicked and slapped on the back, chest, legs and face repeatedly for about thirty or thirty-five minutes. Afterwards, water was thrown on my face and the beatings resumed for approximately fifteen-twenty more minutes. I was then released from the shackles. All the while no one spoke any English to me at all. Four days passed and I had not been fed since my arrest. On October 1, 1984, I was taken to an office of the Head of the Prison. There I was met by Mr. Omar, a translater from the hospital. The first thing he said to me was sign anything they ask or I will continue to be beaten until I sign any statement they asked me for.

I then signed a statement totally in Arabic that was never interpreted to me. I was then returned to my cell.

After 15 to 20 minutes later, the U.S. Embassy agents Martin Quinn, Jim Bigges and Mr. Mazan, talked with me. They had been ordered not to speak with me about my arrest, only about my family. They told me that I should be released in one week at the most. I was given the statement to sign by Lt. Abdullah Aziz. He said that I did nothing wrong in Saudi Arabia and should be released within a week.

I told the Embassy about my beatings. They told me that if a report was filed by them it could make matters worse for me.

On October 3, 1984, I was transported to Al Sijan Prison to await trial on unknown charges. On october 4, 1984 (one week after my arrest), I was visited by the Embassy. They told me that they could not do anything for me, but that they expected my release in "one to two weeks." I never saw any Embassy personnel again. I was put in a prison cell area large enough for approximately fifty men. There were 110 prisoners in the cell area. I slept on the floor in the bathroom where we had to sleep in shifts because there was not enough floor space and because one shift had to depend on the other to keep the rats off.

The mail was pilfered by the guards and destroyed before it got to the inmates. The meals were always the same and consisted of rice with chicken, arabic vegetables, bread and tea. They never varied. The food was served on one large tray which was placed in the prison area. Inmates grabbed for the food with their hands, directly from the one tray.

On November 5, 1984 (39 days after my arrest), I was released from the Al Sijan Prison. Captain Mohammed of the prison told me that I was being released due to a telephone conversation between Senator Kennedy and King Fahd and the efforts of Congressman Larry Smith. The King ordered my immediate release. At 10 p.m. that evening I was returned to my family.

During the period of my incarceration my wife was sexually harassed by assistants to Prince Sultan. She was told that if she would go away for weekends with this particular individual Mr. Aljabar, that I would be released immediately.

She didn't and I remained in jail.

For the next two weeks I was brought around to various government offices where they offered me more and more of my contract to stay in the Kingdom.

Finally after persistent refusals I was allowed to leave the Kingdom after I signed a statement that said that I was leaving under my own free will and that there were no hard feelings between me and Saudi Arabia.

Since my return from Saudi Arabia, I have undergone four operations on my knees that have totally been reconstructed and I am awaiting another two or three on my back.

I am totally disabled, have nowhere to turn but to my own savings to rectify any of these problems.

I am here today in hopes that Congress will see to it that no other Americans are treated in this way, not only in Saudi Arabia but anywhere in the world.

I think you for your time.

[The prepared statement of Mr. Nelson follows:]

PREPARED STATEMENT OF SCOTT NELSON, FORMER EMPLOYEE, HOSPITAL CORP. OF AMERICA

AFFIDAVIT

UPON BEING DULY SWORN, VIVIAN NELSON, STATES AS FOLLOWS:

1. My name is Vivian Elaine Nelson.

2. My husband is Scott Nelson.

3. We reside with our four year old son, Matthew, at 3661 W. Citrus Trace, Davie, Florida.

4. On September 27, 1984, my husband Scott was arrested and jailed in Riyadh, Saudi Arabia without charges or explanation.

5. Approximately two weeks after his arrest, I was approached by Mr. Aljaber, Assistant to Prince Sultan, the Minister of Defense and he made the suggestion to me that in return for a sexual favor he could see that Scott was released. I refused and Scott remained incarcerated.

FURTHER AFFIANT SAYETH NOT.

/s/ Vivian Elaine Nelson
VIVIAN ELAINE NELSON

Sworn and subscribed before me this 27 day of October, 1986, in Miami, Dade County, Florida, U.S.A.

/s/ [Illegible]
Notary Public

AFFIDAVIT OF SCOTT J. NELSON

STATE OF FLORIDA)
) ss:
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared SCOTT J. NELSON, who being duly sworn deposes and says:

1) My name is Scott J. Nelson. The following is a summary of the experience that I had as an American citizen employed in Saudi Arabia. It has affected my family and I emotionally as well as physically in ways that will never be forgotten. I will try to present the facts in as chronological and comprehensive a format as possible:

I was 29 years old in September of 1983, in perfect health, and employed as a Senior Electrical Engineer with Bechtel Construction in Louisville, Kentucky when I saw an ad for a Monitoring Systems Engineer at the King Faisal Specialist Hospital and Research Center in Saudi Arabia. (Exhibit 1 attached hereto.) I went to Saudi Arabia and interviewed for the job with a Mr. Don Laffew and his boss, Riaid Kayyali. I was offered the position and then returned to the United States to complete the processing requirements (visas, medical exam, etc.). After having signed the contract and completed the employment application and having provided them with all of the essential pre-employment information, I left on December 6, 1983 to go to Nashville for my orientation and airline tickets for my journey to Saudi Arabia. (Pre-Employment Physical Exam attached as Exhibit 2.)

My problem began when, as part of my job requirements, I discovered a dangerous grease valve in the oxygen and nitrous oxide lines at the King Faisal Hospital. These were not only a fire hazard, but were endangering patients lives in that all lines that connected to these

valves were contaminated. (See Exhibit #3, dated March 20, 1984, attached hereto.) During the period of March through August of 1984 I reported this discovery to every level of the King Faisal Specialist Hospital (K.F.S.H.), including the Royal Commission, which was already investigating wrong-doings at K.F.S.H. Each department level, rather than taking any kind of action, tried to cover up and ignore this dangerous situation. I was instructed to ignore the problem. After having reported my discoveries, the harrassment became so malicious and relentless that in June of 1984 I tried to resign. I was talked out of resigning by my boss, Don Leffew. During this period I contacted a Ms. Stephanie Smith and Mr. Jim Bigges, U.S. Embassy Agents. I told them about my situation and that K.F.S.H. was refusing to let me leave the Kingdom. I also called the State House in D.C. and spoke to a Ms. Hobgood. She told me that all she could do was file a report on the problem. In September I again tried to submit my resignation to Security, Management, and the Royal Commission, but the hospital refused acceptance of my resignation. (Exhibit #4, Letter of Resignation and Exhibit #5, Performance Evaluation attached hereto.)

On September 27, 1984 I was summoned to Security by Mr. Kareem. I was met there by two investigators who wanted to interview me for a few minutes. Neither investigator spoke English. I was then taken to the Criminal Investigation Division (C.I.D.). There, in a small cell, a man named Abdullah handcuffed me, put me in foot shackles and pushed me to the floor. Four men then entered the cell; one man slapped me in the face, breaking my glasses. Another then punched me in the back of the neck and lower back. Two of the men held my feet while another pulled my shoes off and beat my feet with a bamboo cane approximately ¼ inch in diameter. The beatings had commenced. I was punched, kicked and slapped on the back, chest, legs and face repeatedly for about thirty minutes. Afterwards, water

was thrown on my face and the beatings resumed for approximately another 15-20 minutes. I was then released from the shackles. All the while no one spoke any English to me. Four days passed and I had not been fed since my arrest. On October 1, 1984 I was taken to an office to give my statement. A Mr. Omar from K.F.S.H. was acting as my interpreter. The first thing Mr. Omar said to me was sign anything they ask or I will continue to be beaten until I signed. I then signed a statement in Arabic and returned to my cell. Around fifteen minutes later the U.S. Embassy Agents (Martin Quinn, Jim Bigges and Mr. Mazan) talked with me. They had been ordered not to speak with me about my arrest, only about my family. They told me that I should be released *in one week at the most.* I was given the statement to sign by Lt. Abdullah Aziz. He said that I did nothing wrong in Saudia Arabia and should be released. I told the Embassy about my beatings. They told me that if a report was filed by them it could make matters worse for me.

On October 3, 1984 I was transported to Al Sijan Prison to await trial on unknown charges. On October 4, 1984 (one week after my arrest), I was visited by the Embassy. They told me that they could not do anything for me, but that they expected my release in "one to two weeks." I never saw any Embassy personnel again. I was put in a prison cell area large enough for approximately fifty men. There were one hundred and ten prisoners in the cell area. I slept on the floor in the bathroom where all night long rats crawled all over me. The lights were kept on all night long, 24 hours a day. Mail was pilfered by the guards and destroyed before it got to the inmates. The meals were always the same and consisted of rice with chicken, arabic vegetables, bread and tea. They never varied. The food was served on one large tray which was placed in the prison area. Inmates grabbed for the food with their hands, directly from the one tray. I felt fortunate for the times that I got a handful of food. Once a week I was let outside for fresh air and exercise.

Each day at 1:00 p.m. the convicted prisoners due lashes were removed from the cell area and beaten so that all could watch.

On November 5, 1984 (39 days after my arrest), I was released from the Al Sijan Prison. Captain Mohammed of the prison told me that I was being released due to a telephone conversation between Senator Kennedy and King Fahad who had ordered my immediate release. At 10:00 p.m. I returned home to my family. (Composite Exhibit #6, Letters Regarding Release, attached hereto.) From the time of my arrest to my release I was never charged officially with a crime that I was aware of. I had signed a document in Arabic, but was unaware, and am still unaware, of the contents of the document.

On November 6, 1984 Mr. Alessa from the Royal Commission came to my home to ask me to return to work. I declined the offer. He told me that I could seek employment anywhere in the Kingdom or take a few days to rest and reconsider employment at K.F.S.H. He was very insistent that I did not leave Saudi Arabia with "ill feelings." He offered me an exit/re-entry visa to return to his Kingdom to work. When I asked for my passport he told me that the hospital would regain my passport from the Governor's office. He said that I could leave "immediately." He requested that I write a statement that I could leave Saudi Arabia whenever I wanted and was not being held against my will. I wrote this statement as requested.

November 7, 1984 came, and no passports, visas or tickets were obtained for me and my family. On November 8, 1984 the Embassy went with me to find our passports. We went first to the Royal Commission Jail, but the passports were not there. We drove next to the Deputy Governor's Office and found the passports. I gave the passports to the hospital to obtain airline tickets and exit visas to leave the Kingdom. At both the Royal Commission Jail and the Deputy Governor's Office I was questioned as to why I wished to leave Saudi Arabia and why I would not return to work at K.F.S.H. From November

8 until November 11, the hospital refused to obtain my exit visas and airline tickets. Finally, on November 12, 1984, passports and tickets were given to me and my family to leave Saudi Arabia. I had to resort to seeing the Deputy Governor to get a letter to process my exit visas and obtain the tickets to finally leave the Kingdom.

I returned to the United States and flew to Florida to seek medical help. I contacted Dr. Richard K. Lohmann, an orthopedic surgeon. On November 16, 1984 I began an intensive physical therapy program for my knees and back. I underwent surgery to the left knee on November 27, 1984 (Exhibit #7, hosital records, attached hereto.), and have required physical therapy ever since.

I began treating with a different orthopedic surgeon, Martin M. May, M.D. I required an additional surgery to the right knee, which was performed by Dr. May on September 18, 1986 (Exhibit #8, Dr. May's report, attached hereto). I have been undergoing continual physical therapy for my back and knees, as a result of the beatings I received in Saudi Arabia, and expect that I will need additional surgery for my back. I do not have health insurance and have been forced to pay the medical bills from my own pocket. When I left for Saudi Arabia I was in perfect health, I had a substantial savings account and was capable of supporting my family. I left Saudi Arabia physically beaten and psychologically broken. I have depleted my savings as a result of my medical expenses and am in debt and unable to work.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Scott J. Nelson
SCOTT J. NELSON

SWORN TO AND SUBSCRIBED before me this 18 day of November, 1986.

/s/ David H. Form
Notary Public,
State of Florida
At Large

SAUDI CHARGES AGAINST SCOTT NELSON

I would like to begin my questioning with Mr. Scott Nelson.

Mr. Nelson, in your prepared statement, you say, "My problems began when, as part of my job requirements, I discovered a dangerous grease valve in the oxygen and nitrous oxygen lines in King Faisal Hospital. These were not only a fire hazard but were endangering patients' lives in that all lines that connected to these valves were contaminated."

Then you go on to say that you reported these discoveries and it was the discovery of dangerous equipment at the hospital where you worked and where it was your responsibility to deal with this equipment, which began the process of harassment which led to your beatings and torture and abuse.

Are we to understand that your sole "crime" was that you called attention to a safety violation in the hospital where your job made you responsible for doing that?

Mr. NELSON. Yes, sir.

Mr. LANTOS. That there was never any charge of any wrongdoing against you? Am I correct in assuming that?

Mr. NELSON. That is correct.

Mr. LANTOS. That you were not accused of drug dealing, of dealing in alcohol, of smuggling, or any other crime of any kind?

Mr. NELSON. I was never charged with a crime to the best of my knowledge.

Mr. LANTOS. The only thing that you did was call attention to unsafe conditions at the hospital where you worked?

Mr. NELSON. Yes. You would have to understand that if the blame didn't come on me, it may have come on another Saudi and that Saudi may have—had become responsible for the problem. So instead of them taking the initiative to stand up and say "it's my problem"—these valves were in these lines 10 years before I got there;

they were built there, they were built in that hospital—instead of somebody else coming up where there were problems—we were going under a JCH accreditation, which is a U.S. standard for hospitals. They were trying to bring this particular up, which is the Royal Family's hospital, to American standards.

Through this process, the medical staff was making reports of an intern we had and ad hoc committee from engineering and maintenance that were bringing together problems so that they could be corrected to bring up the hospital to this standard. In the course of the medical examination, they had found a lot of problems with patients expiring due to respiratory failures for simple-type procedures. Respiratory complications in their dental labs, for example.

In Saudi law, if I were to be responsible for the deaths of those citizens or the harm of those citizens, I think I am liable to have my head taken off. So instead of a Saudi standing up and saying, "Yes, these problems were there," they in turned tried to put the blame on me.

Mr. LANTOS. But there was absolutely no other charge against you except you pointed out some safety problem?

Mr. NELSON. I am not aware of any charges being brought up against me.

FORMAL PROTEST TO THE SAUDI GOVERNMENT

I would like you to tell me, Mr. Secretary, when is the last time we specifically in writing protested to the Saudi Government about the abuses that you heard documented here today?

Mr. CREEKMORE. Can I provide that for the record?

Mr. SMITH of Florida. I would very much appreciate that. I am sure the committee would, also.

Mr. CREEKMORE. Be happy to do so.

[The information follows:]

CASE OF HENRY S. RAMSEY

Ramsey was arrested on December 30, 1985 at the Dhahran International Airport for possession of hashish. When he saw a consular officer the following day, he said that arresting officers had forced him to do thirty kneebends until he vomited. The consular officer immediately made an oral protest. Two weeks later, Ramsey complained of the behavior of a prison guard. He said a guard had "fondled" his genitals during a routine inspection following the Ramseys' conjugal visit. The consular officer immediately mentioned this incident to the prison director. Since oral protests were effective, the consular officer did not believe a formal written protest was required. Ramsey was deported on March 17, 1986.

CASE OF SCOTT J. NELSON

On September 24, 1984, Nelson was arrested for having presented Saudi officials with a fraudulent college degree from MIT as proof of job qualifications. He was visited by a consular officer on September 30. During that visit, Nelson claimed to have been "roughed up" by arresting officials. The consular officer noted however that Nelson had no bruises or marks. There was no indication of undue stress as he talked freely while drinking a cola and smoking cigarettes. The officer determined that Nelson's allegation was not credible and made no protest.

During a visit on October 9, Nelson told the consular officer that he had been beaten by prison guards. The consular officer found no evidence of this. The consular officer had also been visited two days earlier by Nelson's former cellmate who said that Nelson had provoked the prison guards by feigning illness to obtain a transfer to the more pleasant surroundings of a hospital. The matter was not raised with local authorities since the consular officer could not determine to what extent Nelson resisted legitimate prison discipline. Nelson was deported on November 12, 1984.

CASE OF SAM BAMIEH

Bamieh was reportedly held in Saudi Arabia against his will from March 4 to July 15, 1986 by two Saudi officials as a means of forcing him to drop a civil lawsuit pending against them in the United States. Bamieh never sought assistance from U.S. officials. On July 1, 1986, he entered the commercial section of the U.S. Consulate General in Jeddah to pick up a telex which had been sent to him from the United States. He made no comment to anyone in the office. No oral or written protest was ever made by U.S. officials since Bamieh never brought his difficulties to their attention.

CASE OF JIM SMRKOVSKI

As previously noted, U.S. officials did not protest Smrkovski's allegations of mistreatment by arresting officials as he specifically asked that no protest be filed for fear of jeopardizing a possible amnesty. The Embassy did submit a diplomatic note to the Ministry of Foreign Affairs on July 23, 1986 to protest the fact that Smrkovski was being held incommunicado. Consular officers had been denied access to Smrkovski from June 22-September 6, 1986, a period of sixty-three days.

Mr. SMITH of Florida. Thank you very much.

Thank you, Mr. Chairman.

ADMINISTRATION COMMENTS ON TESTIMONY OF PRIVATE WITNESSES

Mr. LANTOS. We have been at this now for almost 3½ hours, so I would like to conclude with just a couple of questions, Mr. Creekmore.

I welcome the other gentlemen commenting, also.

Do you have any question about the veracity of the witnesses of the previous panel?

Mr. CREEKMORE. Mr. Chairman, I was not here for all of it but I certainly would not question the word of what

they say. I will simply, without being able to be absolutely certain about it, take what they say.

Mr. LANTOS. Mr. Adams, you are more familiar with these cases than probably anybody else on the panel. You have studied these cases. You have probably met all these people. Is there any doubt in your mind of their veracity?

Mr. ADAMS. No, there is no doubt in my mind.

Mr. LANTOS. There is no doubt in your mind.

Mr. ADAMS. I don't challenge their veracity, no.

Mr. LANTOS. The Department doesn't challenge the veracity of any of our witnesses?

Mr. ADAMS. No.

Mr. LANTOS. Could one of you state that for the record.

Mr. ADAMS. That is correct.

AFFIDAVIT

I, ABDULLAH JARY ASSABHAN, of P.O. Box 1454, Riyadh 11431, Saudi Arabia, make oath and say as follows:—

1. I am a Saudi Arabian advocate licenced to appear in all Saudi Arabian Courts and tribunals and to practice all aspects of Saudi Arabian law. I received my legal education at the Imam Mohammed Bin Saud Islamic University and the Institute of Public Administration in Riyadh and became a fully qualified advocate in 1983. I am at present working at The Law Firm of Salah Al-Hejailan (which is associated with the English Law Firm of Clifford Chance) in Riyadh. I am competent to testify to the matters set forth herein which are based upon my personal knowledge.

2. In Saudi Arabia disputes between employers and employees are subject to the jurisdiction of specialist Labour Committees. The Labour Committees apply a body of fair substantive law governing the rights and duties of employer and employee and provide redress for personal injuries suffered in violation of Saudi law. The rights and duties of employer and employee (including the duty of an employer to compensate an employee for occupation-related injuries arising in certain specified circumstances) are regulated in considerable detail by the Saudi Arabian Labour Law ("the Labour Law") (Royal Decree no. M/21 dated 6 Ramadan 1389/15th November 1969).

3. I am informed that Mr. Scott Nelson has alleged that:—

"As recruiter and/or employer of the Plaintiff, [the Kingdom of Saudi Arabia and the King Faisal Specialist Hospital] owed to the Plaintiff the duty to exercise due care to prevent injury to the Plaintiff, including the duty to adequately warn and instruct him of the hidden dangers associated with the employment".

and that the King Faisal Specialist Hospital and the Kingdom of Saudi Arabia:—

"knew or should have known that officials of the Saudi government, and officials of Saudi institutions such as KFSH, have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause."

and that:—

"officials of the King Faisal Specialist Hospital would be likely to take severe retaliatory action against Nelson if he reported and/or attempted to remedy, and/or disclosed to others, any health related or other hazards or problems which he discovered in King Faisal Specialist Hospital".

However, Saudi Arabian law does not impose a duty on a recruiter or employer of labour to warn employees of any such hazard as are alleged above, either before or during employment. An employer may certainly, under Saudi Arabian law, be liable for certain injuries incurred by an employee arising out of the hazards of his employment, but an employer will not be liable for failure to warn the employee of such hazards as are alleged by the Plaintiff, either in advance of his employment or during the same. We are unaware of any case where a Saudi Court has imposed on an employer a duty to warn in respect of any occupational hazards.

4. Further, the Plaintiff's allegation that Saudi officials have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused without legal cause is incorrect. Neither Saudi government officials nor Saudi government entities nor any other person or entity in Saudi Arabia has the power, to have persons summarily arrested, detained and physically abused without legal cause. Such action would be contrary to Saudi law.

5. All claims arising out of an alleged breach of the Labour Law (including claims for occupation-related injuries) are time-barred after 12 months from the date of such alleged breach or 12 months from the date of termination of the employment contract in question.

SWORN this 21st day of June, 1989 at Al-Dahna Centre Building, Al-Ahsaa Street, Riyadh, Saudi Arabia Before me, R. T. Price.

An English Solicitor empowered to administer oaths.

AGREEMENT

THE ROYAL CABINET OF THE KINGDOM
OF SAUDI ARABIA

and

HOSPITAL CORPORATION OF AMERICA, LTD.

KING FAISAL SPECIALIST HOSPITAL

RIYADH, SAUDI ARABIA

THIS AGREEMENT made and entered into this 26th day of August, 1973 by and between the Royal Cabinet of the Kingdom of Saudi Arabia, represented by the Private Office of His Majesty King Faisal Bin Abdul Aziz (referred to hereinafter as the "Owner") and Hospital Corporation of America, Ltd., a company duly established under the laws of the Cayman Islands, whose registered office is situated at Barclays Bank Building, George Town, Grand Cayman Islands (referred to hereinafter as "HCA");

WITNESSETH:

WHEREAS, Owner is constructing the King Faisal Specialist Hospital in Riyadh, Kingdom of Saudi Arabia and related housing and other facilities (referred to hereinafter as "Hospital"), the Hospital containing 245 beds, with completion of construction scheduled for December, 1974; and

WHEREAS, HCA is a wholly-owned subsidiary of Hospital Corporation of America, a corporation organized and existing under the laws of the State of Tennessee, U.S.A. (hereinafter referred to as "HSP"), which operates 51 hospitals in the U.S.A. and which has the expertise and experience reflected in the documents attached hereto and collectively referred to as Annex A, with capability to staff and assume management of operations of the Hospital; and

WHEREAS, HCA has entered, or will enter into contracts with parties which are contractors with Owner providing, respectively, the computer communication network, laboratory and nuclear medicine systems, and the equipment and supplies for the Hospital, whereby such parties will provide continuing services to HCA and the Hospital.

WHEREAS, the parties hereto wish to establish the terms and conditions of their relationship.

NOW, THEREFORE, it is agreed by and between the parties hereto as set forth herein, that HCA shall act for Owner as follows:

I. SCOPE OF AGREEMENT

1.1 HCA will, on the effective date of this Agreement, assume the overall responsibility of recruiting the technical, administrative and other staff which will be required to open and operate the Hospital and, to the extent specified by Owner, will recruit the medical staff. HCA will also coordinate the managerial aspects of the Hospital with the work being done by others in completing the construction and equipping of the Hospital. On or before the date when the Hospital is first open and receiving patients, Owner has contracted for an inventory of supplies for operation and maintenance of all departments of the Hospital. Upon the commissioning of the Hospital, HCA will assume complete management responsibility for operations of the Hospital, as described hereafter in this Agreement. Throughout the term of this Agreement, HCA will continue to keep Owner advised of developments and innovations in delivery of health care and hospital management of which it may become apprised.

1.2 HCA will immediately commence recruitment activities of personnel to be employed at the Hospital. Attached hereto as Annex B is preliminary staffing chart showing the categories of professional and other employees and the estimated number required to fully staff the Hospital. Owner shall approve the standard form of employment contract which HCA will use in the recruitment activities of expatriate personnel, in order to assure that such contract adequately sets forth the conditions of employment of the Hospital deemed necessary by Owner. All such employment contracts will be between Owner and the employee, but may be executed for Owner by HCA as agent. The payment of salaries and benefits of staff personnel will be administered by HCA for the Owner,

as provided in Section 4.4 hereafter. All expatriate personnel recruited must be acceptable to Owner which acceptability shall be evidenced by issuance of an entrance visa.

(a) Owner and HCA shall agree upon the number and composition of the medical staff, after which HCA shall recruit candidates for such position. It is agreed that Owner shall, after consultation with HCA, select the candidates to be employed and shall set their salary and other remuneration; Or, upon Owner's request, HCA will assume such responsibility to select, to employ, and to set remuneration of the medical staff. Owner shall bear the costs of physicians' travel, other expenses in accordance with the provisions of the respective employment contracts, remuneration and related expenses. HCA will make available to the medical staff, from time to time as a part of an ongoing medical education program, the full facilities of the hospitals in the United States owned and operated by HSP. Members of the medical staffs of such hospitals will from time to time, at the Owner's request, conduct specialized educational programs for members of the medical staff of the Hospital in HSP hospitals or other facilities in the United States. It is agreed that Owner will be responsible for the travel and living expenses incurred by members of the medical staff in connection with their participation in such medical and education program for such period of time as may be decided by Owner from time to time.

(b) HCA will recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust their salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel. All travel expenses in accordance with the provisions of the respective employment contracts of personnel employed by HCA will be paid by Owner, including such expenses

of replacement of personnel employed from time to time. HCA will also make available to all personnel the full facilities of the hospitals in the United States owned and operated by HSP for specialized continuing education programs at times and on schedules as may be mutually agreeable with HCA and Owner. As in the case of the medical staff, Owner will be responsible for the travel and living expenses incurred by such personnel in connection with their attendance at educational programs for a period of time to be decided by Owner, from time to time.

(c) HCA will provide a management team of not less than four professional persons to supervise the operation of the Hospital consisting of at least an Executive Director, Association Director, Controller and Director of Nursing Services. The members of this management team will be employees of HCA and their salaries will be paid by HCA.

(d) HCA will be guided by local laws and customs in making staff assignments of employees and will use its best efforts to enforce compliance therewith by all personnel.

1.3 When the Hospital is commissioned, HCA will assume complete management responsibility for all operational matters, patient care, clinical research activities related to patient care, maintenance of all buildings, power services, engineering systems, equipment and grounds, providing of supplies to the extent reflects on Schedule A, in-service training of personnel, long-range planning, and such other matters as may from time to time be delegated by Owner or its representatives. In addition, HCA will cooperate and where appropriate, coordinate with members of the medical staff to maximize quality patient care, facility utilization and physician-patient-employee relationships. It is understood that Owner may, at some time hereafter, utilize the Hospital together with such additional facilities, equipment and

supplies as may be appropriate, to conduct fundamental research which is not contemplated by this Agreement and the expenses of which are not included in the contract price. Should Owner make such determination, HCA will advise and consult with Owner as to such research and provide estimates and budgets as to capital expenditures and operational costs and administer such program to the extent Owner may delegate authority.

1.4 It is recognized that availability of housing facilities is essential in order to attract and retain personnel from without Saudi Arabia. HCA will assume responsibility for operation, maintenance and supervision of the housing unit and related facilities on the Hospital premises. Owner will bear all expenses of furnishing such facilities. Where housing facilities on-site are not allocated to expatriate personnel, Owner agrees to pay a housing allowance for such personnel employed at the Hospital in accordance with regulations in effect from time to time in the Kingdom of Saudi Arabia. Owner agrees that employees of HCA, its sub-contractors, and other personnel recruited by HCA shall be permitted to bring personal belongings into Saudi Arabia, excluding such items as Owner may specify, without custom and duty charges. Owner will provide the procedures whereby such personnel may conveniently obtain necessary entrance and exit visas and documents relating to importation and exportation of personal effects.

1.5 HCA has entered, or will enter into, contracts with Scientific Control Systems, Ltd. ("SCICON") and American Hospital Supply Universal Corporation ("AHSUC") securing the continuing services of such parties in the operation of the Hospital, in form acceptable to Owner. Such contracts will contain provisions to the effect that if HCA defaults in its performance thereunder, or if this Agreement is terminated for any reason, Owner will be substituted in the place and stead of HCA and will continue such contracts with SCICON and AHSUC.

All the above provisions shall be applicable to any other sub-contractors which HCA may enter into which shall be acceptable to Owner as to form and content.

1.6 It is acknowledged that the ultimate authority for the operation of the Hospital is Owner. The officers and employees of HCA, including specifically the Executive Director of the Hospital, will on a continual basis, consult with work in a cooperative manner with Owner and its delegates. It is further acknowledged that it is essential that HCA have access to policy and decision-making bodies in order to carry out its responsibilities under this Agreement.

1.7 Owner agrees that it will make available to all expatriate personnel employed at the Hospital and their immediate families resident in Saudi Arabia all medical and dental facilities and services provided by the Hospital at no cost to personnel.

II. RECRUITMENT POLICIES

HCA will, to the extent consistent with its responsibilities under this Agreement, give preference to citizens of Saudi Arabia in employment and will train persons with the long-range view of developing their expertise in the technical and administrative management positions of various hospital departments. HCA will make available to such personnel the extensive film library and educational aid materials utilized in HSP hospitals in the United States. However, it is recognized and agreed that initially HCA may find it necessary to employ personnel for management and supervisory functions from outside Saudi Arabia.

III. TERM

The term of this Agreement shall commence as of the date first above written and shall extend through August 31, 1980.

IV. CONTRACT PRICE

4.1 The contract price and schedule of payments is set forth on Schedule A hereto, marked "Contract Price and Schedule of Payments" and signed by the parties hereto, which schedule is incorporated by reference herein. It is agreed that such contract price is subject to adjustment commensurate with any enlargement of the total Hospital facilities.

4.2 It is understood and agreed that the contract price is based upon the complete operational management of the Hospital by HCA and makes provision for payment by it of expenses of delivery of patient care, maintenance of all buildings, power services, animal house for clinical support, transportation services, including helicopter pad, engineering systems, equipment and grounds on the basis of the design scope of the physical construction of the Hospital at the signing date of this contract and the degree of sophistication of patient care expected to be provided, but not including payment of employees remuneration. All such non-employee expenses will be paid by HCA to the extent of the contract price. However, it is further understood that the nature of patient care is highly dependent upon the state of medical technology existing at any given time. As advancements in technology are achieved, the Hospital will be operated so as to take advantage of and receive the benefits of such advancements, and restrictions on patient care will not be imposed due to increased costs which may exceed the contract price, it being the policy of the Owner to provide that quality of patient care which medical technology permits. Therefore, the contract price is divided into two categories of expenses. The amounts shown on such Schedule under items referred to as Fixed Charges for each of the fiscal periods include only those terms of pre-determinable management and operating expenses which are directly related to operation of the Hospital and maintenance of the physical facilities (on the basis of the present design, size and equipment complement) of the Hospital. As to the

amounts shown on such Schedule under items referred to as Variable Charges, HCA and HSP, based upon their experience in budget estimating gained through operating 51 hospitals in the United States, consider these amounts their present best estimates of expenses expected to be incurred in the providing of health care services to patients in the Hospital and other costs related to the operation of the Hospital in the form conceived and as it will be completed. It is recognized that the Variable Charges are also subject to variation depending upon the activities conducted in the Hospital, such as medical research, and the extent of patient care to be provided, which may include the effect on expenses of such factors as occupancy, patient categories, (e.g., open heart surgery or obstetrical care), average length of stay, number of clinic and outpatient visits, and others. Therefore, consistent with the policy of Owner as to operation of the Hospital, the scope of HCA's responsibilities and the necessarily estimated nature of the amounts shown on the Schedule, it is agreed that if it should become necessary for the delivery of patient care that the expenses of HCA for any fiscal period exceed the amounts shown on Schedule A as Variable Charges, HCA will submit to Owner financial, accounting and other data in form mutually agreeable showing actual expenditures for the period involved in excess of the estimated amounts shown as Variable Charges on Schedule A. Such submissions as may be necessary will be made no more frequently than quarterly. Upon such submission and agreement therewith by Owner, the Schedule will be amended according retrospectively as to expenses previously incurred (for which HCA shall then be reimbursed) and prospectively to include such excess costs in Variable Charges if same are of a recurring nature.

4.3 It is understood and agreed that until August 31, 1974, HCA and its sub-contractors shall pay all payroll and other labor expenses which they incur. Owner agrees to pay the salaries and allowable expenses of all physicians directly.

4.4 Effective as of September 1, 1974, personnel who shall have recruited and employed at the Hospital, shall be paid by Owner, except SCICON and AHSUC employees and the HCA management team. All operational, supply, maintenance, and other expenses of operating Hospital, to the extent of the contract amount shown on the Schedule, shall be paid by HCA. Owner will bear the expenses of all salaries and agreed upon benefits included in the remuneration arrangements of all employees at the Hospital. HCA agrees to administer the payment of all such payroll and other expenses utilizing Owner's funds which shall be deposited by Owner in a bank or other depository from time to time. Owner and HCA will agree upon the procedures to be established to assure that HCA will have available the necessary funds to timely pay such salaries and benefits expenses, it being agreed that prompt payment to employees is essential for the efficient operation of the Hospital.

4.5 The contract price is based upon the understanding that no corporation or equivalent taxes are payable by HCA but should any such taxes be or become payable, appropriate adjustments to the contract price shall be made.

V. CURRENCY AND PLACE OF PAYMENT

Payment of all amounts due to HCA under this Agreement is to be made in U.S. Dollars and deposited to the account of HCA at such depository as HCA may from time to time designate in writing.

VI. BANK GUARANTEE

HCA shall procure to Owner a letter of guarantee issued by an internationally recognized bank in Owner's favor by which such bank warrants irrevocably that all advance payments, to the extent unearned, made to HCA pursuant to the provisions of Schedule A hereto shall be reimbursed in the event of the termination of this Agreement.

VII. LANGUAGE

HCA agrees that it will, within 90 days of the date hereof deliver to Owner a translation in the Arabic language of this Agreement, including Schedule A. Notwithstanding such translation, it is agreed by Owner and HCA that the English language version of this Agreement and Schedule A shall be controlling for purposes of construction of meaning and all other purposes.

VIII. PERFORMANCE

In the event of totally unforeseen circumstances which would require HCA to be unable to continue to perform under this Agreement and it so advises Owner, nevertheless HCA will continue to operate the Hospital for a period of six months after such notice, during which time payment of the management fee other than direct costs of operating the Hospital will be withheld until final withdrawal by HCA on terms satisfactory to Owner.

IX. NOTICES

Any written notice or communication mailed or delivered by either party to the other shall be to the following addresses:

If to Owner: King Faisal Specialist Hospital
Royal Cabinet
Post Office Box 2727
Riyadh, Saudi Arabia

If to HCA: Hospital Corporation of America, Ltd.
Post Office Box 550
Nashville, Tennessee, U.S.A. 37202

X. SUFFICIENCY OF AGREEMENT INSTRUMENT

10.1 The terms and conditions contained in the present instrument and the annexes thereto constitute the entire agreement between the parties hereto in respect of the

subject thereof and shall supercede any and all prior communications, representations, agreements and/or understandings, either oral or written, between the parties hereto in respect of said subject matter.

10.2 If any one of the terms and conditions of this Agreement would appear to be or to become ineffective for any cause or reason whatsoever, the ensuing nullity shall not affect any other provision or provisions hereof and the parties hereto agree to substitute in any such event forthwith such other effective provisions as will most closely correspond with the legal and economic contents of the provisions so avoided.

XI. AMENDMENTS

It is acknowledged by Owner and by HCA that this Agreement may be amended from time to time dependent upon changing circumstances, increased responsibilities of HCA and other contingencies. It is therefore agreed that any such amendments shall be effected only by written instrument executed on behalf of the Hospital by His Excellency Dr. Rifat Alsayed Ali and on behalf of HCA by Dr. Thomas F. Frist, Jr. or Thomas W. Todd.

Should either party for any reason desire to change its authorized delegate for this purpose, this Agreement shall be amended as set forth in this section.

IN WITNESS WHEREOF, the parties hereto have set their hands the 26th day of August, 1973.

SIGNED BY: His Excellency
authorized by the Royal Cabinet
of the Kingdom of Saudi Arabia

/s/ [Illegible]

SIGNED BY: /s/ John C. Neff
President for Hospital Corporation of America, Ltd.

SCHEDULE OF CONTRACT AMOUNT AND PAYMENT
YEAR OF OPERATIONAL BUILD-UP
1 September 1973 - 1 September 1974
(U.S. DOLLARS IN THOUSANDS)

PERIOD I Hospital Corporation Complete Orientation to Hospital, Equipment, Contracts, and Warranties. Development of Staffing Plans, Remuneration Programs, Employee Contracts, and Classifications.

PERIOD II Establishing Recruitment Sources Worldwide. Establishing Recruitment Materials: Films, Brochures, Documents for All Levels of Personnel. Interface Management Techniques With the Unique Technology of the Hospital, With Special Reference To The Computer/Communication Network.

PERIOD III Recruitment of Employees and Medical Staff. Development of Operational Systems and Manuals. Establishing of King Faisal Specialist Hospital Permanent Management Team.

* * * *

CONTRACT PRICE THIS PERIOD 3,750

* * * *

PAYMENT SCHEDULE

1 September 1973	375
31 December 1973	1,500
1 May 1974	1,875
	3,750

/s/ John C. Neff
President
For Hospital Corporation of America

/s/ Illegible
For Owner

SCHEDULE OF CONTRACT AND PAYMENT
YEAR OF BUILD-UP AND OPENING
1 September 1974 - 1 September 1975
(U.S. DOLLARS IN THOUSANDS)

A ITEMS:	Recruitment and Initial Orientation of Employees and Medical Staff, Pre-Operational Testing of all Facilities and Equipment, Implementation of Operational Systems, Opening of Hospital, Initial Operational Testing and Implementations. Reception of Patients. Takeover of Complete Operational Responsibility of the Hospital.		5,691
B ITEMS:	Variable Items Directly Related to Patient Care. It is Fully Recognized These Items Are Related to the Opening Schedule of 1 January, 1975. In the Event of Unforeseen Delay of More Than 30 Days, It Is Agreed These B Items Will Be Adjusted Downward Accordingly.		
	Utilities		170
	Supplies		
	Operating Room	170	
	Labor & Delivery	11	
	I.V.	51	
	Clinic Services	74	
	Central Supply	102	
	Laboratory & Nuclear Medicine	221	
	Blood Bank	70	
	Radiology	230	
	Pharmacy	204	
	Physical Therapy	19	
	Intensive Care	72	
	Dietary	374	
	Housekeeping	40	
	Linen & Laundry	94	
	Stationery	34	
	Medical Records & Library	20	
	Business Office	33	
	Maintenance	35	
	Nursing Service	170	
	Total Supplies		2,024
	Other Expenses:		
	Communication, Transportation		273
			2,467

/s/ John C. Neff
For Hospital Corporation of America

For Owner

CONTRACT PRICE THIS PERIOD

A ITEMS	5,691
B ITEMS	2,467
	8,158

* * * *

PAYMENT SCHEDULE

	Total	A Items	B Items
1 September 1974	1,884	1,884	—
31 December 1974	2,908	1,983	925
30 April 1975	3,366	1,824	1,542
	8,158	5,691	2,467

For Hospital Corporation of America

For Owner

AMENDMENT NUMBER THREE TO THE AGREEMENT DATED 26 AUGUST 1973 BETWEEN THE ROYAL CABINET OF THE KINGDOM OF SAUDI ARABIA (OWNER) AND HOSPITAL CORPORATION OF AMERICA, LTD. (HCA).

WHEREAS, the Agreement as extended by Amendment Number One, dated 29 June 1980, and Amendment Number Two, effective 1 September 1981 is to expire 31 August 1982:

And,

WHEREAS, the OWNER and HCA wish to extend the Agreement:

THEREFORE, the OWNER and HCA agree that the Agreement is hereby extended for a period of one year from 1 September 1982, through 31 August 1983, with the following changes, alterations and amendments:

1) HCA will provide up to four (4) full time equivalents of HCA Professional Staff at the Hospital (44 man hours per week per person), either permanent or on a consulting type basis as required by OWNER.

2) HCA is not responsible for all costs or any payments associated with the computer or data processing system. Therefore, the HCA fee is hereby reduced by an amount equal to the previous SCICON contract value for computer operations (see attached computation).

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التعديل رقم ٣ للاتفاقية المحررة في اغسطس ١٩٧٣م بين الديوان الملكي - لمملكة العربية السعودية (المالك) وشركة مستشفيات كوربوريشن اوف امريكا المحدودة (HCA) .

حيث ان الاتفاقية كما عدلت بالتعديل رقم بتاريخ ٢٩ يونيو ١٩٨٠ والتعديل رقم (٢) الساري المفعول اعتبارا من اول سبتمبر ١٩٨١ ستنتهي مفعولها في ٣١ اغسطس ١٩٨٢م .

وحيث ان المالك وشركة (HCA) يرغبان في تمديد الاتفاقية المذكورة ، لذلك تم الاتفاق بين المالك وشركة (HCA) على تمديد الاتفاقية لمدة عام واحد اعتبارا من اول سبتمبر ١٩٨٢م ولغاية ٣١ اغسطس ١٩٨٣م بالتعديلات والتغييرات التالية :-

١) تقدم شركة (HCA) للمالك عددا من الاخصائيين لايتجاوز الاربعة اشخاص للعمل بالمستشفى (بمعدل ٤٤ ساعة / رجل للاسبوع للشخص الواحد) وذلك كاشخاص دائمين او على اساس استشاري وفقا لما يراه ويطلبه المالك .

٢) شركة HCA غير مسئولة عن كافة التكلفة او عن اي دفعات لها علاقة بالحاسب الالكتروني (الكمبيوتر) او انظمة المعلومات . وبناء على ذلك فقد تم تخفيض اتعاب شركة HCA بمبلغ يعادل قيمة عقدها السابق مع شركة ساكون لتشغيل الكمبيوتر - (يلاحظ بيان الحساب المرفق) .

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EXHIBIT 3

3) OWNER shall be solely responsible for recruitment from within the Kingdom of Saudi Arabia. Therefore, the HCA fee is hereby reduced by $200,000 (Two Hundred Thousand U.S. Dollars Only). (See attached computation.)

- تقع مسئولية التوظيف من ضمن المملكة العربية السعودية على عاتق المالك ، وبناء عليه فقد تم تخفيض اتعاب شركة HCA بمبلغ ٢٠٠,٠٠٠ر٠٠ دولار (مائتي الف دولار امريكي) - يلاحظ بيان الحسابات المرفق) .

4) The price for this contract year 1982/1983 (HCA annual fee "A" items) is U.S. $10,258,653 (Ten Million, Two Hundred Fifty-eight Thousand, Six Hundred Fifty-three U.S. Dollars Only). Payments equal to one-sixth (1/6) of the annual price will be made to HCA on a two-month basis in arrears, except for the first payment which will be made within thirty (30) days of signing this amendment. The maximum total backcharges and penalties for the current contract year 1982/1983 will not exceed a total of twenty percent (20%) of the above contract price. The OWNER has the right to impose such backcharges and penalties at his own and absolute judgement, HCA will pay the OWNER such backcharges and penalties without delay or object thereto for any reason whatsoever. HCA will provide the OWNER with a performance bond (Letter of Credit) for twenty percent (20%) of the above contract price from a local bank and its wording acceptable to the OWNER as an "A" Items Guarantee.

تكون قيمة العقد للسنة الحالية ٨٢/٨٣ (اتعاب شركة HCA السنوية بند أ) مبلغ ١٠,٢٥٨,٦٥٣,٠٠ دولار (عشرة ملايين ومائتان وثمانية وخمسون الفا وستمائة وثلاثة وخمسون دولارا امريكيا) تدفع لشركة HCA على ستة دفعات متساوية بمعدل دفعة في نهاية كل شهرين (باستثناء الدفعة الاولى التي تتم خلال ٣٠ يوم من توقيع هذا التعديل.
ويكون الحد الاقصى للمقتطعات والاستقطاعات من المصروفات المرفوضة للسنة التعاقدية الحالية ٨٢/٨٣ مبلغ لايتجاوز ٢٠٪ (عشرون بالمائة) من قيمة العقد اعلاه .
وحق للمالك ان يحمل شركة HCA بهذه الغرامات والاستقطاعات طبقا لتقديره المطلق . وتدفع شركة HCA للمالك قيمة هذه الغرامات والاستقطاعات بدون تأخير وبدون اعتراضات مهما كانت الاسباب .
وتقدم شركة HCA للمالك ضمان بنكي بمبلغ ٢٠٪ من قيمة العقد صادرا من بنك محلي ويكون هذا الضمان مقبولا للمالك ويعتبر هذا الضمان كضمان الاتعاب (بند أ) .

The HCA will continue to provide the OWNER with a trimester management report, and a recruiting status report every sixty (60) days.

وتستمر شركة HCA في تقديم التقرير الربع سنوي للمالك وكذلك تقدم تقريرا له عن وضع التوظيف كل ٦٠ يوما .

5) OWNER has the option of opening a Visas Liaison Office in the U.S.A., for the purpose of coordinating visa

- للمالك الخيار في ان يفتح له مكتبا للتأشيرات في امريكا لاغراض تنسيق خدمات التأشيرات بين شركة HCA والقنصليات

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services between HCA and the Saudi Arabian Consulate there, at a contract cost reduction of $108,453 (One Hundred Eight Thousand, Six Hundred Fifty-three U.S. Dollars Only) annually or pro-rata thereof.

العربية السعودية هناك . وفي هذه الحالة يتم تخفيض قيمة العقد بمبلغ ١٠٨٫٦٥٣٫٠٠ دولار (مائة وثمانية الف وستمائة وثلاثة وخمسون دولارا امريكيا) سنويا او بالتناسب مع العشرة من السنة

6) The OWNER has the option of assuming recruiting from the Middle East at a contract cost reduction of $150,000 (One Hundred Fifty Thousand U.S. Dollars Only) annually or pro-rata thereof.

للمالك الخيار في ان يتولى مهمة التعاقد من منطقة الشرق الاوسط وفي هذه الحالة يتم تخفيض العقد بمبلغ ١٥٠٫٠٠٠٫٠٠ دولار (مائة وخمسون الف دولار امريكي) سنويا او بمايتناسب مع العشرة من السنة .

7) This agreement shall be automatically extended beyond 31 August 1983 for two (2) successive terms of one (1) year each unless either party gives written notice of its intention to amend and/or change and/or not to further extend the agreement at least ninety (90) days prior to the expiration of each contract year.

تمدد هذه الاتفاقية تلقائيا لمدة سنتين متتاليتين بعد ٣١ اغسطس ١٩٨٣ سنة واحدة لكل تمديد الا اذا أخطر أحد الطرفين الطرف الآخر كتابيا في نيته لتعديل الاتفاقية تعبير نيته في عدم رغبته في تمديد العقد في موعد لايتجاوز ٩٠ يوما قبل انتهاء السنة الجارية للعقد .

8) Any terms and conditions contained in the Agreement, and Amendments One and Two, which may be inconsistent or conflict with this Amendment, are hereby superceded.

تكون شروط هذا التعديل هي الغالبة في حالة تعارضها او عدم مطابقتها لاي شرط من شروط الاتفاقية والتعديل الاول والثاني .

IN WITNESS WHEREOF THE PARTIES HERETO HAVE SET THEIR HANDS THIS 31st DAY OF AUGUST 1982.

واثباتا لذلك وقع الطرفان على هذا في اليوم والسنة المشار اليهما اعلاه بتاريخ ٣١ اغسطس ١٩٨٢م .

For HCA, Ltd.:

Dr. Calvin R. Pastors

شركة سرفيسز كوربوريشن اوف كا المحدودة

Calvin R. Pastors

د / كالفن ر. باستورز

For the OWNER:

pp for: Hussein A. Gezairy

Dr. Hussein A. Gezairy
The Authorized Representative

د / حسين أ. حزاعري
المفوض

COMPUTATION

Contract Year 1981/82 (Inflation Factor 9%)		$11,164,406 x 1.09 =	$12,169,202
LESS SCICON 1981/82 (Inflation Factor 9%)	$ 1,569,311 x 1.09 =	(1,710,549)	
LESS Local Recruiting Office Cost 1982/83	(200,000)		1,910,549
	TOTAL CONTRACT PRICE		$10,258,653

OPTIONS

LESS		
1. Visas Liaison Office Cost	(108,653)	
2. Recruiting Office (Middle East)	(150,000)	$ 258,653

TOTAL CONTRACT PRICE IF OPTIONS UTILIZED	$10,000,000

For HCA, Ltd:

Dr. Calvin R. Pastors

شركة اتش.سي.اية HCA

Calvin R. Pastors

د / كالفين ر. باستورز

For the OWNER:

Dr. Hussein A. Gezairy
The Authorized Representative

المالـــــــك:

د / حسين أ. عزاشري
المفوض

LETTER OF UNDERSTANDING

In view of the extension and amendment to the King Faisal Specialist Hospital and Research Centre and HCA, Ltd. agreement beginning September 1, 1982; and, in order to clarify certain related issues, the following items are hereby approved by both parties:

1. That the "permanent" HCA, Ltd. staff continue receiving the same benefits and use of facilities as they have in prior years.

2. That the "permanent" HCA female staff be furnished housing by the Hospital at lease cost plus 20% for utilities and maintenance.

3. That the Hospital provide the "permanent" HCA, Ltd. staff, not living in Hospital housing, villa maintenance services at SR 1,000 per month plus cost of parts.

4. That the Hospital provide HCA, Ltd. with automobile maintenance services for up to five (5) vehicles at SR 400 per vehicle per month plus cost of parts.

5. That "temporary" HCA, Ltd. female consultants be housed in Hospital housing at SR 1,000 per week per unit plus 20% for utilities.

6. Mutually agreed to additions or deletions to this list may be effected periodically.

For HCA, Ltd.:

Dr. Calvin R. Pastors

For the OWNER:

pp for:

Dr. Hussain A. Gezairy
The Authorized Representative

مذكرة تفاهم

فيما لموضوعات معينة تتصل باتفاق معدل والتعديل المبرم بين مستشفى الملك فيصل التخصصي وشركة هوسبتال كوربوريشن امريكا لمعتمد (HCA) والذي بدأ في اول سبتمبر ١٩٨٢م ، فقد تمت موافقة الطرفين على البنود الآتية : -

١. استمرار موظفي شركة HCA الدائمين في الحصول على نفس المنافع وفي استعمال التسهيلات كما كانوا في السنوات السابقة .

٢. تزويد موظفات شركة انترناشونال HCA الدائمات (من الاناث) بسكن مؤثث من المستشفى وذلك مقابل تكلفة الايجار مع اضافة ٢٠٪ للمرافق والصيانة .

٣. تزويد المستشفى موظفي انترناشونال HCA الدائمين الذين لا يسكنون بمساكن المستشفى - بالصيانة اللازمة لمساكنهم مقابل ١٠٠٠ ريال (الف ريال) شهريا بالاضافة الى تكلفة قطع الغيار .

٤. تزود المستشفى شركة انترناشونال HCA بالصيانة اللازمة لسياراتها بحد اقصى (٥) خمسة سيارات وذلك مقابل ٤٠٠ ريال (اربعمائة ريال) شهريا لكل سيارة بالاضافة الى تكلفة قطع الغيار .

٥. تزود المستشفى موظفات انترناشونال HCA الاستشاريات المؤقتات (من الاناث) بسكن في مساكن المستشفى وذلك مقابل ١٠٠٠ ريال (الف ريال) اسبوعيا لكل وحدة سكنية بالاضافة الى ٢٠٪ للمرافق .

٦. يجوز الاضافة على او الحذف من هذه القائمة وذلك باتفاق الطرفين من وقت لآخر .

شركة انترناشونال HCA

ر / كالفين ر. باستورز

المالك

ر / حسين أ. جزائري
الدور المعتمد

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MEMORANDUM OPINION

[Filed Aug. 11, 1989]

This cause is before the court on Defendants' motions to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602-1611.

Facts

King Faisal Specialist Hospital ("KSFH"), located in Riyadh, Saudi Arabia, is owned and controlled by the Saudi government. Royspec (short for "Royal Specialists"), a separate corporate entity also owned and controlled by the Saudi government, is KFSH's purchasing agent. Royspec maintains an office in Maryland, and purchases hospital supplies and equipment in the United States. Until 1979, a U.S. corporation performed both purchasing and employee recruitment functions for KFSH in the United States, but in that year, the Saudi government created Royspec as purchasing for KFSH.

Plaintiff Scott Nelson was hired as Monitoring Systems Engineer at KFSH after being recruited for the position by Hospital Corporation of America ("HCA") or an affiliated company. After a job interview in Saudi Arabia, Nelson returned to the United States, and in November 1983, while in Miami, signed an employment contract with KFSH. Nelson began his job in Riyadh the following month after attending orientation sessions conducted by HCA or an affiliated company in Tennessee.

As set forth in his job description, Nelson was responsible for assuring compliance with safety regulations, as well as for coordinating all technical activities and recom-

mending modifications of the hospital's equipment. Nelson alleges that he repeatedly reported safety violations to a government commission and in retaliation, government agents unlawfully arrested him.[1] He further alleges that he was held against his will for 39 days, during which time he was interrogated, shackled, beaten, and tortured. In a sixteen-count complaint against KFSH, Royspec, and the Kingdom of Saudi Arabia, Nelson and his wife attempt to state causes of action based on international law, common law torts, and derivative claims.[2]

Discussion

In two separate motions to dismiss, the Defendants question this court's subject-matter jurisdiction over the complaint. Nelson's complaint alleges that jurisdiction is premised upon diversity of citizenship, 28 U.S.C. § 1331, and the Alien Tort Statute, 28 U.S.C. § 1350. In January of this year, however, the United States Supreme Court expressly held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 690 (1989). Therefore, this court's subject-matter jurisdiction, if it exists at all, must be premised upon 28 U.S.C. § 1330(a), which provides that the district courts shall have original jurisdiction of any action against a foreign state if the foreign state is not entitled to immunity under the FSIA.[3]

[1] Defendants allege that Nelson was arrested when the government discovered he had misrepresented his credentials, rather than in retaliation for reporting safety violations; however, those disputed facts are not relevant to the motions to dismiss.

[2] In a separate complaint, case no. 88-0484-Civ-Nesbitt, the Nelsons are suing HCA and HCA International Company for negligent failure to warn of the hazards associated with working in Saudi Arabia. Although the cases arise from the same facts, the two actions were never officially consolidated by any order of this court.

[3] The question of whether a foreign state is entitled to immunity involves resolution of factual issues, complicated in this case by the separate complaint against two U.S. corporations. The United States Court of Appeals for the Eleventh Circuit has noted that a district court is not required to accept the allegations of a complaint as true if a 12(b)(1) motion attacks the asserted factual basis of jurisdiction. *See Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982). Under the FSIA, however, the burden is on the party seeking immunity to establish that no exception to immunity applies. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) (citing H.R. Rep. No. 1487, 94th Cong. 2d Sess. 17 (1976); *Behring Internat'l, Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 396, 405 & n. 9 (D.N.J. 1979)). Defendants in this case are in the position of having to prove a negative, with the advantage that the allegations of the complaint are *not* presumed to be correct. The court has been careful to confine its resolution of the jurisdictional issue to this case without resolving the disputed issues raised in the related case against HCA and HCA International.

The FSIA grants immunity to foreign states, with certain exceptions outlined in § 1605. The parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1. That section states, "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which the action is based upon a commercial activity carried on in the United States by a foreign state." A "commercial activity carried on in the United States by a foreign state" is defined as commercial activity carried on by the foreign state and having "substantial contact with the United States." 28 U.S.C. § 1603(e). A "commercial activity" is further defined as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d).

The inquiry, therefore, is two-fold: first, did any of the Defendants carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities?

The parties do not dispute that Royspec, which maintains an office in Maryland and purchases supplies and

equipment in the United States, carries on commercial activities in this country. The only commercial activities allegedly undertaken in this country by Saudi Arabia and KFSH, however, relate to Nelson's recruitment. Neither KFSH nor the Saudi government was directly involved in Nelson's recruitment; rather, KFSH or the government entered into a contract with a U.S. corporation, which performed the actual recruitment activities. The agreement with the American corporation may represent a commercial transaction, but Nelson was not a party to that contract. In fact, the agreement serves to separate the Saudi defendants from recruitment activities in the United States, because the U.S. corporation in essence acted as a middleman: Nelson dealt with the U.S. corporation, which in turn had an agreement with a Saudi governmental entity in Arabia.

Nelson's complaint, however, alleges that the recruitment arrangement established an agency relationship between the Defendants and the U.S. corporation. This allegation implicates the related case against HCA and HCA International, because Nelson seeks to hold the Saudi government responsible for any duty breached by its alleged agent. The court does not find it necessary to resolve the agency question, which may be a pivotal factual issue in the related case, because the link between the recruitment activities and the Defendants is not sufficient to establish "substantial contact" with the United States.

In discussing the meaning of "substantial contact" under § 1603(e) of the FSIA, the United States Court of Appeals for the District of Columbia Circuit has referred to the statute's legislative history. That court noted that Congress gave several examples of substantial contact, such as transactions performed in whole or in part in this country, import-export transactions, business torts, and financing or loan agreements involving American financial institutions. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (quoting H.R. Rep. No.

1487, 94th Cong., 2d Sess. 17, reprinted in U.S. Code Cong. & Admin. News 1976, pp. 6604, 6615, 6616). The Court finds that the recruitment activities purportedly undertaken by Defendants, albeit indirectly through their alleged U.S. agents, do not qualify as substantial contact between a foreign state and the United States under any of these examples. Although the recruitment agreement could conceivably be considered a transaction performed in part in this country, the transaction involved only the Saudi government and a U.S. corporation. Nelson was not a party to that contract; rather, he was involved in a separate transaction with the U.S. corporation. The court therefore concludes that for purposes of Nelson's complaint, the Saudi defendants have not had substantial contact with the United States.

Nelson also argues that because he signed his employment contract with KFSH while in Miami, KFSH has had substantial contact with this country. The court disagrees. Nelson was interviewed by KFSH in Saudi Arabia, and the employment contract was to be performed in Saudi Arabia. It is a fortuitous happenstance that Nelson signed the agreement while in Miami, rather than while in Saudi Arabia or at some other location. As Congress noted, the definition of substantial contact was "intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976).

For these reasons, the court concludes that neither KFSH nor Saudi Arabia has carried on commercial activity in the United States, as defined in § 1603(d) and (e) of the FSIA. The court has found, however, that Royspec has been engaged in commercial activity; accordingly, the court must proceed to the second step in the analysis and consider whether Nelson's complaint is based on Royspec's commercial activity.

Although the United States Court of Appeals for the Eleventh Circuit has not considered the interpretation of "based upon" as used in § 1602(a)(2), the former Fifth Circuit has stated that the focus of the inquiry "is on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity." *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980). In discussing the *Arango* decision, as well as decisions from other federal courts, the current Fifth Circuit has noted that *Arango* is consistent with the so-called "nexus test," in which the court looks for a nexus between the commercial activity and the allegations of the complaint. *See Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 203 (5th Cir. 1984). Therefore, the appropriate inquiry in the instant case is whether Nelson's complaint has a connection or nexus with Royspec's commercial activity in this country.

As noted, Royspec is the purchasing agent for KFSH. The only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency. The court finds absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint (negligent failure to warn, battery, false imprisonment, and derivative claims by Vivian Nelson). Because no nexus exists between the torts and the commercial activity, the exception to immunity under § 1602(a)(2) is inapplicable to Royspec, and the court is therefore without subject-matter jurisdiction to consider Nelson's claims against Royspec.

Furthermore, even if the court had determined that KFSH and Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint. A different question would be

presented if Nelson had alleged some type of commercial cause of action arising from the employment contract.[4] The gravamen of Nelson's complaint, though, is an action for personal injuries under various theories of law. Although Nelson argues that but for his recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries, the court finds this "connection" far too tenuous to support jurisdiction over a foreign sovereign.

Similarly, the court finds that Nelson's causes of action based on negligent failure to warn have no nexus with commercial activities in this country. Such a conclusion is implicit in the finding that neither KFSH nor Saudi Arabia's commercial activities had substantial contact with the United States. Nelson argues that he should have been warned when recruited that the job for which he was hired (reporting safety violations to the Saudi government) involved the risk of imprisonment and torture. Nelson does not allege that the commercial activities indirectly undertaken by the Saudi defendants in this country were for the purpose of imprisoning and torturing U.S. citizens. Again, the "connection" between the cause of action alleged and the Defendants' commercial activities would be too tenuous to support subject-matter jurisdiction over a foreign sovereign.

For the above-stated reasons, the court concludes that all three Defendants have met their burden of establishing sovereign immunity, and that the court lacks subject-matter jurisdiction to consider Nelson's claims against the Saudi defendants. The court therefore declines to reach the issue of whether the act of state doctrine would apply to the facts of this case.[5]

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[4] The court recognizes, however, that if Nelson had pleaded a contract cause of action, the forum selection clause of the employment contract would require the parties to litigate in Saudi Arabia.

[5] The court also finds it unnecessary to consider the question of venue, although Defendants' motions devoted more time to that

This cause will be DISMISSED for lack of subject-matter jurisdiction under 28 U.S.C. § 1330(a) by separate order. The trial date in case no. 88-0484-Civ-Nesbitt will also be set by separate order.

DONE and ORDERED in chambers, Miami, Florida, this 11th day of August 1989.

/s/ Lenore C. Nesbitt

LENORE C. NESBITT
United States District Judge

cc: Jorge A. Duarte, Esq.
Marc Cooper, Esq.
Maureen E. Mahoney, Esq.
Scott E. Perwin, Esq.

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issue than to the question of subject-matter jurisdiction. It is axiomatic that the court must determine whether it has jurisdiction over a matter before reaching other issues.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-5981

SCOTT NELSON and VIVIAN NELSON, Individually and as Husband/Wife,
Plaintiffs-Appellants,

v.

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Feb. 21, 1991

Jorge A. Duarte, P.A., Miami, Fla. and Anthony D'Amato, Northwestern University School of Law, Chicago, Ill, for plaintiffs-appellants.

Maureen E. Mahoney, Lathan & Watkins, Washington, D.C., for Saudi Arabia.

Marc Cooper, Wolfe & Bolotin, P.A., Miami, Fla., for King Faisal Hosp. and Saudi Arabia.

Before EDMONDSON and BIRCH, Circuit Judges, and RE *, Chief Judge.

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

RE, Chief Judge:

Plaintiffs-appellants, Scott and Vivian Nelson, appeal from a judgment of the United States District Court for the Southern District of Florida, dismissing their claim against defendants-appellees, Saudi Arabia, King Faisal Specialist Hospital, and Royspec, for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976.

Scott Nelson was hired, in the United States, as a monitoring systems engineer for the King Faisal Specialist Hospital (the Hospital) in Riyadh, Saudi Arabia. Nelson alleged that, in the course of performing his duties under his employment contract with the Hospital, he was detained and tortured by agents of the Saudi government in Saudi Arabia in retaliation for reporting safety violations at the Hospital.

Nelson brought suit for his injuries against Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the government of Saudi Arabia (collectively Saudi Arabia). Nelson alleged subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (the FSIA). The district court concluded that Nelson's claims were not based upon the commercial activities of Saudi Arabia carried on in the United States, as required by the FSIA, and granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction.

On appeal, Nelson contends that the district court erred in granting Saudi Arabia's motion to dismiss. Nelson asserts that, since his detention and torture were based upon his recruitment and hiring in the United States by an agent of the Saudi government, the district court has subject matter jurisdiction under the FSIA.

The question presented is whether the district court erred in determining that it does not have subject matter jurisdiction under the FSIA. More specifically, did the court have jurisdiction in this action for damages for the

detention and torture of Nelson by agents of the Saudi government, in Saudi Arabia, in retaliation for Nelson's conduct his employment in Saudi Arabia in a position for which he was recruited and hired in the United States by an agent of the Saudi government.

Since we conclude that Nelson's detention and torture were based upon the recruitment and hiring of Nelson in the United States by an agent of the Saudi government, and that the recruitment and hiring was a commercial activity of Saudi Arabia, we hold that the district court has subject matter jurisdiction under the FSIA. Accordingly, we reverse the judgment of the district court.

BACKGROUND

In 1983, Scott Nelson, while in the United States, saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital (the Hospital), in Riyadh, Saudi Arabia. The recruitment was conducted by the Hospital Corporation of America (HCA), an independent corporation which, in 1973, had contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the hospital.

After submitting an application, Nelson was interviewed in Saudi Arabia by two officials of the Hospital. Subsequently, he returned to the United States, and entered into a contract of employment with the Hospital as a monitoring systems engineer. The contract was signed in Miami, Florida, in November, 1983.

Nelson commenced employment at the Hospital on December 7, 1983. As stated in the Hospital's job description for monitoring systems engineer, Nelson was "[r]esponsible for the development and expansion of electronic monitoring and control systems capabilities." He was also responsible for recommending "modifications of existing equipment and the purchase and installation of new equipment."

Nelson alleges that, on March 20, 1984, in the course of his duties at the Hospital, he discovered certain safety hazards, and reported these safety hazards to an investigative commission of the Saudi government. Nelson states that, on September 27, 1984, he was summoned to the Hospital's security office by agents or employees of the Hospital. He alleges that, from the security office, he was moved to a jail cell where he was "shackled, tortured and beaten" by agents or employees of the Saudi government. Nelson states that he was imprisoned for 39 days, during which time he was never informed of any charges against him, nor was he ever accused of a crime. He further states that his wife was told by a Saudi government official that he could be released if she provided sexual favors.

Nelson and his wife, Vivian Nelson, sued Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the Saudi government which acts as a purchasing agent for the Hospital. Nelson sought compensatory and punitive damages under 16 counts, and asserted that the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1602-1611. Saudi Arabia moved for dismissal for lack of subject matter jurisdiction.

The district court concluded that "the link between the recruitment activities and the Defendants is not sufficient to establish 'substantial contact' with the United States," within the meaning of 28 U.S.C. § 1603(e). *Nelson v. Saudi Arabia*, No. 88-1791, slip op. at 5 (S.D.Fla. Aug. 11, 1989). The district court also noted that "even if the court had determined that [the Hospital] and Saudi Arabia had carired on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint." *Id.* at 8. Accordingly, the district court granted Saudi Arabia's motion to dismiss for lack of

subject matter jurisdiction, thereby dismissing the action against all defendants.

DISCUSSION

In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812), the Supreme Court adopted the common law doctrine of foreign sovereign immunity. As noted in *The Schooner Exchange*, the doctrine of foreign sovereign immunity rests on principles of comity between nations. *See id.* at 135-36. *See also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983).

On the question of foreign sovereign immunity, the Supreme Court has generally deferred to the decisions or recommendations of the Executive Branch of government. *See id.; Ex Parte Republic of Peru*, 318 U.S. 578, 586-90, 63 S.Ct. 793, 799-800, 87 L.Ed. 1014 (1943) (discussing reasons for deferring to Executive Branch). Consequently, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967.

The doctrine of foreign sovereign immunity is closely related to the act of state doctrine. As articulated in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897), under the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252, 18 S.Ct. at 84. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n. 7, 96 S.Ct. 1854, 1859 n. 7, 48 L.Ed.2d 301 (1976).

Neither the doctrine of foreign sovereign immunity nor the act of state doctrine are as widely applied now as in the past. Indeed, it was suggested years ago that the act of state doctrine had "earned a well-deserved rest." E. Re, *Foreign Confiscations in Anglo-American Law* 170 (1951). *See also* Cardozo, *International Law in the New York Courts—1953*, 40 Cornell L.Q. 97, 109 (1955) ("the urge to grant sovereign immunity has also lost much of its force"). Surely, "the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.'" *Alfred Dunhill*, 425 U.S. at 705, 96 S.Ct. at 1866.

The present restrictive attitude in the application of the act of state doctrine is reflected in Justice Scalia's opinion in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, —— U.S. ——, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). In *Kirkpatrick* the plaintiff, an American corporation that unsuccessfully bid on a public works contract in Nigeria, sued the defendant, an American corporation that was the successful bidder on the contract. The plaintiff brought suit for damages, and contended that the defendant, which had pled guilty to violations of the Foreign Corrupt Practices Act of 1977, had paid bribes to Nigerian officials in order to obtain the contract. *See id.* 110 S.Ct. at 702-03. The defendant moved to dismiss, contending that the suit was barred by the act of state doctrine. The district court granted the motion to dismiss. The Court of Appeals for the Third Circuit, however, reversed, and the Supreme court granted the defendant's writ of certiorari. *See id.* at 703-04.

In *Kirkpatrick*, the Supreme Court noted that, in prior opinions, several Justices had suggested an exception to the act of state doctrine for commercial transactions. *See id.* at 704 (citing *Alfred Dunhill*, 425 U.S. at 695-706, 96 S.Ct. at 1861-1867 (opinion of White, J.)). The Court

stated that, apart from any exceptions, the act of state doctrine does not apply in *Kirkpatrick*, since "[n]othing in the present suit requires the court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 314, 62 L.Ed. 733 (1918)).

The present application of the doctrine of foreign sovereign immunity was significantly influenced by the shift or change in United States policy announced in the May 19, 1952 letter from the Acting Legal Adviser of the Department of State to the Acting Attorney General. After referring to the classical or "absolute" theory of sovereign immunity, the letter stated that "'it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.'" 26 Dep't St.Bull. 984, 985 (1952) (quoting Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952)).

The restrictive theory of sovereign immunity which was embraced by the 1952 policy grants immunity to a foreign sovereign only for acts characterized as "public" and not as to those deemed "private." According to the modern theory, a state may be held liable in the courts of another nation if "it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act." Article 11, Draft Convention on Competence of Courts in Regard to Foreign States, *quoted in* Re, *Judicial Developments in Sovereign Immunity and Foreign Confiscations*, 1 N.Y.L.Forum 160, 167 (1955).

In the Restatement, it is stated that under the act of state doctrine the courts of the United States "will generally refrain from . . . sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Restatement (Third) of Foreign Relations § 443(1) (1987). It has been noted, however, that the effect of the Restatement "has been to present the act of state doctrine as broader in scope, more general in application, more preclusive of international law, and less susceptible of limitation than is warranted by governing authority." Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 Int'l Law. 1, 13-14 (1990). *See also* Olmstead, *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States—Jurisdiction*, 14 Yale J. Int'l L. 468, 481-82 (1989).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (the FSIA). *See* 28 U.S.C. §§ 1602-1611 (1988). As noted by Professor Hans Smit, the FSIA represented "an attempt at comprehensive statutory regulation of jurisdictional immunities of foreign states and their agencies and instrumentalities." Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea For Drastic Surgery*, *reprinted in* American Society of International Law, Proceedings of the 74th Annual Meeting 49, 49 (1980).

According to the Report of the Judiciary Committee of the House of Representatives, the FSIA was enacted "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6604. The House Report also notes that the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial or private acts. *See id.* at 7, 1976 U.S.Code Cong. & Admin.News at 6605.

The FSIA provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

28 U.S.C. § 1605(a)(2) (1988). Under the FSIA, a "commercial activity carried on in the United States by a foreign state" is defined as a "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e) (1988).

In this case, Nelson contends that the district court has subject matter jurisdiction under the first clause of section 1605(a)(2), since "the action is based upon a commercial activity carried on in the United States by the foreign state . . . ." More specifically, Nelson states that "[t]he arbitrary prolonged detention and the physical torture of Mr. Nelson . . . is based directly upon the recruitment activity carried on in the United States by agents of Saudi Arabia."

In order to conclude that there is subject matter jurisdiction under the first clause of section 1605(a)(2), the court must find that Saudi Arabia's recruitment and hiring of Nelson, in the United States, was a "commercial activity," within the meaning of the FSIA. The FSIA provides that "[t]he commercial character of an activity

shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1988). *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

Citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988), Saudi Arabia asserts that the mere recruitment of an employee in the United States is an insufficient contact on which to base subject matter jurisdiction under the FSIA. In *Zedan*, the plaintiff, while in the United States, received a phone call recruting him to work on a project in Saudi Arabia for a company which was not an agency of the Saudi government. *See id.* at 1512. After the plaintiff had worked on the project for two different companies for approximately three years, the project was taken over by an agency of the Saudi government. Several months later, after completing his employment, but without receiving total payment, the plaintiff returned to the United States. The plaintiff then sued Saudi Arabia, seeking money due him under his contract of employment. The district court granted Saudi Arabia's motion to dismiss. *See id.*

On appeal, the Court of Appeals for the District of Columbia Circuit agreed that the district court lacked subject matter jurisdiction, and affirmed. In its jurisdictional analysis under the first clause of section 1605(a)(2), the court stated that the phone call recruiting the plaintiff was merely a "preliminary step" or a "precursor" to a commercial transaction. *See id.* at 1513. Hence, the court concluded that "[t]he link between a recruitment phone call in [the United States] and the [intervention of the Saudi government] two-and-one-half years and two employers later is, in our view, too attenuated to constitute a 'direct causal connection.'" *Id.* at 1514.

In the present case, however, it is clear from the record that the recruitment and hiring of Nelson, in the United

States, was part of a process having "substantial contact with the United States." The recruitment was conducted by the Hospital Corporation of America (HCA), which in 1973 contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the Hospital. HCA, a corporation organized under the laws of the Grand Cayman Islands, is the wholly owned subsidiary of an American corporation. The contract created an agency relationship between HCA and Saudi Arabia. Under the contract, HCA was empowered to "recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust their salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel." In addition, the contract expressly provides that all "employment contracts will be between [Saudi Arabia] and the employee, but may be executed for [Saudi Arabia] by HCA as agent." The contract also states that "[a]ll expatriate personnel recruited must be acceptable to [Saudi Arabia] which acceptability shall be evidenced by issuance of an entrance visa."

On the facts presented we agree with Nelson that the recruitment and hiring in the United States constituted a "commercial activity" of Saudi Arabia, within the meaning of the FSIA. Nevertheless, in order to establish subject matter jurisdiction under the FSIA, the court must also conclude that the detention and torture of Nelson, in Saudi Arabia, were "based upon" Nelson's recruitment and hiring in the United States.

Judicial authority reveals that a claim is "based upon" the commercial activity of a foreign state when there is a "jurisdictional nexus" between the acts for which damages are sought, and the foreign sovereign's commercial activity.

For example, in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730

F.2d 195 (5th Cir. 1984), the plaintiff, the owner of a vessel, sued the defendants, an agent of the Algerian government and the Republic of Algeria, to recover for the loss of the vessel. The district court granted the defendant's motion to dismiss. On appeal, the plaintiff asserted subject matter jurisdiction under the first clause of section 1605(a)(2). *See id.* at 199.

The court in *Vencedora* noted that the courts had varying interpretations of the jurisdictional reach of the first clause of section 1605(a)(2). *See id.* at 199-200. After reviewing four different formulations of the jurisdictional scope of the first clause of section 1605(a)(2), the court adopted the nexus approach. Under the nexus view or requirement, there is subject matter jurisdiction if there is a "nexus" between the acts giving rise to liability, and the commercial activity carried on by the foreign state in the United States. *See id.* at 202. *See also De Sanchez*, 770 F.2d at 1391 (subject matter jurisdiction under section 1605(a)(2) requires a "jurisdictional nexus with the United States").

In addition, the Court of Appeals for the Ninth Circuit has held that there is subject matter jurisdiction under the first clause of section 160(a)(2) if there is "a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir.1989). Similarly, the Court of Appeals for the Third Circuit has stated that "[i]t is essential that there be a nexus between the plaintiffs' grievance and the sovereign's commercial activity." *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir.1981). *Cf. Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988) (subject matter jurisdiction under section 1605(a)(2) requires "a connection" between the commercial activity and the act complained of in the suit.)

This jurisdictional nexus requirement between the act complained of or grievance, and the commercial activity

or business enterprise conducted by the foreign state is salutary and necessary to satisfy both the congressional policy of the FSIA and sound principles of comity. The nexus requirement implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable. It is comparable to the requirement that there be a causal connection in order to impose liability in the civil law of torts. The jurisdictional nexus requirement of the FSIA finds a domestic parallel in the requirement of a nexus in the application of long-arm statutes. *See, e.g., American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178-79 (1st Cir.1989).

Saudi Arabia contends that the district court lacks subject matter jurisdiction under the FSIA since Nelson's claims "are based upon the governmental exercise of police power in a foreign country." Saudi Arabia asserts that "[t]he claims are based upon the acts of the Saudi police and prison officials—'governmental' acts beyond the reach of the commercial activity exception."

In support of its contention, Saudi Arabia cites *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir.1980). In *Arango*, the plaintiffs contended that they suffered injuries when their vacation tour, which was sponsored in part by the defendant, the national airline of the Dominican Republic, was terminated. The plaintiffs asserted that, because their names were on a list of undesirable aliens, upon their arrival in the Dominican Republic immigration officials denied them entry into the country, "man-handled" them, and "involuntarily rerouted" them to the United States. *See id.* at 1373. The plaintiffs sought damages under breach of contract and several tort claims, including false imprisonment and battery. The district court granted the defendant's motion to dismiss on all claims. *See id.* at 1374.

The Court of Appeals for the Fifth Circuit dismissed the appeal because, under Rule 54(b) of the Federal Rules of Civil Procedure, the order granting the defen-

dant's motion to dismiss was not a final order. *See id.* at 1377-78. Notwithstanding its dismissal of the appeal on separate procedural grounds, the court of appeals discussed the applicable substantive law, and, "in the interest of expediency, proceed[ed] to offer [the district] court some guidance in its further handling of these issues." *Id.* at 1378. The court considered whether there was subject matter jurisdiction, under the first clause of section 1605(a)(2), for the claims of false imprisonment and battery. The court stated that in "man-handling" the plaintiffs during the denial of their entry into the country, the defendant "acted merely as an arm or agent of the Dominican government in carrying out his assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself." *Id.* at 1379. The court, however, concluded that the defendant's actions which gave rise to the claims for breach of warranty and breach of contract were connected to the defendant's commercial activity. Hence, the district court would have had subject matter jurisdiction over these claims under section 1605(a)(2) of the FSIA. *See id.* at 1379-80.

Saudi Arabia also cites *Gregorian v. Izvestia*, 871 F.2d 1515, 1521-22 (9th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 237, 107 L.Ed.2d 188 (1989). In *Gregorian*, the plaintiffs brought suit against the defendant *Izvestia*, a newspaper of the Soviet government, contending that they were libelled by an article published in *Izvestia* which, according to the plaintiff, was written and published so that agencies of the Soviet government could "avoid contractual obligations to plaintiffs resulting from alleged promises to pay for medical equipment transported to the Soviet Union by plaintiffs." *Id.* at 1516. The plaintiffs contended that the libel was a "commercial activity," within the meaning of the FSIA, since it "was published with the *purpose* of injuring plaintiffs by avoiding commercial obligations." *Id.* at 1521 (emphasis in original).

The court noted that, under the FSIA, the court must look to the "nature" of the activity at issue, rather than its purpose. *See id.* (citing 28 U.S.C. § 1603(d)). The court found that because *Izvestia* articles are " 'official commentary of the Soviet government,' " publishing and writing them " 'constitutes an activity whose essential nature is public or governmental.' " *Id.* (quoting *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 856 (S.D.N.Y.1978)). Hence, the libel claim was dismissed for lack of subject matter jurisdiction under section 1605(a)(2). *See id.* at 1522.

In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia. In his complaint, Nelson alleged that, in the course of his duties, he discovered safety hazards at the Hospital and that he reported these hazards to an investigative body of the Saudi government. Nelson further asserted that as a result of those actions, "[h]e was summoned . . . by agents or employees of [the Hospital] to the [H]ospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by agents or employees of SAUDI ARABIA . . . ."

Unlike the facts in *Arango*, in this case the actions of Saudi Arabia resulted from and were directly attributable to Nelson's employment. Furthermore, the Hospital's job description for monitoring systems engineer, the specific position for which Nelson was recruited and hired in the United States, including recommending modifications to existing equipment. The Hospital's job description also states that a monitoring systems engineer "[a]ssures compliance with safety regulations[,]" and "[t]roubleshoots problems and implements corrective action." Hence, detecting and reporting safety violations at the Hospital

was a required employment duty for the position for which Nelson was recruited and hired in the United States.

Saudi Arabia, however, asserts that the actions taken against Nelson were the result of Nelson's submission of a false diploma from the Massachusetts Institute of Technology in his application for employment. In making this argument, Saudi Arabia in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arbia, and supports Nelson's claim of subject matter jurisdiction.

There is also a separate question as to whether the district court properly dismissed Nelson's claim against Royspec. Nelson asserts that Royspec, an instrumentality of the Saudi government, is within the subject matter jurisdiction of the court, under the FSIA, since it "was directly involved in the recruitment of Mr. Nelson."

It is undisputed that Royspec, derived from Royal Specialist Purchasing Services, was founded by the Hospital in 1979. It is also undisputed that Royspec maintains an office in Maryland, and acts as the purchasing agent for the Hospital, in the United States. Furthermore, Nelson was given the phone number of Royspec's Maryland office so that his family could contact him, while he was in Saudi Arabia, in the event of an emergency. We also note that four telegrams, all of which acknowledge Nelson's employment, contain the telex designation "ROSPEC," which, according to Nelson, may be the designation for Royspec. Although Saudi Arabia denies that the designation "ROSPEC" represents Royspec, on the record before the court and under the FSIA, we conclude that Royspec is within the subject matter jurisdiction of the court.

Finally, our holding is not based upon the act of state doctrine but on the interpretation and application of the FSIA. On the facts presented we hold that the district

court erred in determining that it did not have subject matter jurisdiction.

CONCLUSION

Since we conclude that, on the facts presented, the recruitment and hiring of Nelson in the United States was a "commercial activity" of the Saudi government, and that Nelson's subsequent detention and torture were "based upon" Nelson's recruitment and hiring in the United States, the district court erred in determining that there was no subject matter jurisdiction under the FSIA. Accordingly, we REVERSE the judgment of the district court, and REMAND the case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF REHEARING AND SUGGESTION FOR REHEARING IN BANC

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CERTIFICATE OF INTERESTED PERSONS

The United States, as *amicus curiae*, adds the following names to the certificates previously filed by the parties:

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REQUIRED STATEMENT FOR IN BANC SUGGESTION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of this circuit, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether inherently sovereign law enforcement activities of officials of a foreign state, carried out in that country, can be challenged in United States courts under the commercial activities exception to sovereign immunity in the Foreign Sovereign Immunities Act.

2. Whether jurisdiction exists under the Foreign Sovereign Immunities Act to challenge non-commercial foreign state conduct when separate commercial conduct is used to establish the required nexus with the United States for jurisdiction under that statute.

/s/ Douglas Letter
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF REHEARING AND SUGGESTION FOR REHEARING IN BANC

INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit, and Federal Rule of Appellate Procedure 29, permitting *amicus curiae* filings by the United States. We support rehearing and *in banc* consideration because the panel's opinion incorrectly applies an important federal statute with major foreign policy ramifications.

This case involves a suit filed in federal district court by two American citizens against a foreign state—Saudi Arabia—and two of its instrumentalities concerning the police activities of that state. A panel of this Court reversed the decision by the district court and found jurisdiction to sue these foreign defendants in a United States court under one part of the commercial activities section of the Foreign Sovereign Immunities Act (the FSIA) (28 U.S.C. 1602 *et seq.*).

The United States has a very substantial interest in the application of the FSIA, which is the only means by

which foreign states may be sued in United States courts. See *Argentine Republic* v. *Amerada Hess Shipping Co.*, 488 U.S. 428, 434 (1987). Foreign relations depend to a large extent on reciprocal treatment between two states. Thus, if police activities of foreign states are deemed commercial and questioned and punished in United States courts, it is likely that the law enforcement conduct of the United States will also be called into account in foreign courts. And, American law enforcement officials will have to appear in foreign courts to defend their conduct.

Further, if the prevailing law in this country is that foreign police activity can be judged in our courts by our standards, it will be difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities. Even when local foreign law would permit the United States to raise immunity defenses that would not be available under the FSIA, the United States nevertheless uses that statute as a standard for our own claims of immunity in foreign courts. Under this practice, the United States would be foreclosed from asserting immunity for claims in foreign courts involving our law enforcement activity.

Consequently, although Congress has in the FSIA clearly assigned to the federal courts the responsibility to determine whether foreign states may be sued here consistently with that statute, the Executive Branch—which is responsible for the foreign relations of the United States—has a keen interest in how the courts apply the law. The FSIA's "intent to deprive the Executive of a conclusive say in this area does not mean that the Executive is to avoid any role in the adjudicatory process." *Practical Concepts Inc.* v. *Republic of Bolivia*, 811 F.2d 1543, 1552 n.21 (D.C. Cir. 1987). The Executive Branch maintains a legitimate interest in the correct interpretation of the FSIA because of its foreign policy impact. *Id.* at 1545 n.2.

As described below, we believe that the panel decision here erroneously applies the FSIA in a serious way.

Plaintiffs' complaint focuses on the conduct of Saudi police authorities in arresting and jailing Scott Nelson. The panel deemed the charges justiciable because it found a "nexus" between the alleged tortious police activity of the Saudis and Saudi commercial activity in the United States.

But this reasoning is flawed because, although plaintiffs allege highly reprehensible conduct by Saudi officials, the fact remains that law enforcement activity is *sovereign* in nature. Congress had no intent in the FSIA to waive immunity, under the statute's commercial activities provision, for foreign governments to be sued here for their governmental acts such as police activities. Indeed, as far as we are aware, this is the first and only instance in which any federal court has found jurisdiction over foreign law enforcement activities under the FSIA commercial activities exception.

Substantial precedent from this Court and other courts of appeals supports our view, and casts grave doubt on the panel ruling.

Moreover, the panel separately erred in finding a sufficient nexus between the commercial activity in the United States and the conduct actually being challenged. Its ruling on this point is inconsistent with many other circuit decisions which make clear that the commercial activity providing the jurisdictional nexus with the United States must itself be the activity on which the lawsuit is based. Here, it is not.

We nevertheless wish to make clear at the outset that the United States takes *no* position regarding the underlying merits in this case. Plaintiffs have alleged beatings and torture by Saudi agents, activity that we strongly condemn. The record reveals, however, that there is sharp disagreement regarding the facts underlying plaintiffs' claims.

Officials from the United States Department of State have had extensive contact with both the plaintiffs and

with the Saudi government regarding this matter. We have attempted to assure that the plaintiffs will have an appropriate forum in which to present their claims. This process is ongoing. If it fails, the United States retains the option of espousing plaintiffs' claims against Saudi Arabia—if it finds them to have merit—as an official matter between the two governments.

Nevertheless, our position is that Congress did not make the types of claims at issue here cognizable in United States courts, and that the panel's interpretation of the FSIA is likely to cause serious difficulties for the United States in future cases brought in foreign courts.[1] We therefore urge that the panel grant rehearing or that the full Court hear this caes *in banc*.

STATEMENT

1. *The FSIA Scheme*

In *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1492-93 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), this Court described the shift in the United States from granting absolute immunity to foreign states in the federal courts to a restrictive theory of immunity, under which immunity is confined to suits involving public acts of a foreign state. This restrictive theory was codified in the FSIA in 1976. *Id.* at 1493.

In that statute, Congress drew a critical distinction between the commercial acts of foreign states and their

[1] Because plaintiffs have alleged highly reprehensible conduct by a foreign state, this case calls to mind the observation by the Second Circuit in a difficult case also involving asserted henious activity, but in which foreign sovereign immunity was upheld, *Letelier* v. *Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("How one wishes to decide a case comes lightly to mind, on a wing; but often how one must decide it comes arduously, weighed down by somber thought. To rule otherwise here would only illustrate once again that hard cases make bad law").

public or sovereign ones. "Where a foreign state's sovereign acts are the basis of a suit, the United States refrains from exercising jurisdiction out of respect for the defendant's coequal sovereign status." *de Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

Relevant to this case is the FSIA waiver of foreign sovereign immunity for cases "in which the action is based upon a commercial activity carried on in the United States by a foreign state * * *." 28 U.S.C. 1605(a)(2). That is the section upon which jurisdiction was found by the panel here.

"[C]ommercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d).[2]

2. *This Litigation*

Plaintiff Scott Nelson is an American citizen who answered an advertisement concerning employment in Saudi Arabia in the King Faisal Specialist Hospital (the Hospital), a government instrumentality. The recruitment was conducted by the Hospital Corporation of America, an American company operating in this country under a contract with the Saudi government. See *Nelson* v. *Saudi Arabia*, 923 F.2d 1528, 1530 (11th Cir. 1991).

Nelson was interviewed in Saudi Arabia, and accepted employment as an engineer with the Hospital, signing the employment contract in the United States. As part of the

[2] The FSIA also contains a waiver for certain tort actions (28 U.S.C. 1605(a)(5)), but that section is not applicable here because it covers only cases in which the damage or loss occurs in the United States. See *Amerada Hess*, 488 U.S. at 439-41.

hiring process, Nelson submitted what he now concedes is a fraudulent diploma from the Massachusetts Institute of Technology. *Id.* at 1530, 1536.

Nelson began work at the Hospital in Saudi Arabia, and part of his job included monitoring equipment in the Hospital building. Nelson contends that in March 1984, he found a building safety hazard, which he reported to Saudi authorities. The Saudis meanwhile discovered the fraudulent nature of Nelson's diploma, and in September 1984 he was summoned to the Hospital security office. *Id.* at 1530.

Nelson contends that he was taken from the Hospital to a jail, where he was beaten and tortured by Saudi officials. He was incarcerated for 39 days and was released following his pardon by the Saudis after intervention by United States authorities. *Id.* at 1530.

Several years after returning to the United States, Nelson filed this action against Saudi Arabia, the Hospital, and a Saudi agency doing procurement business in this country. He claims serious physical injuries and raises a number of tort causes of action including battery, unlawful detainment, wrongful arrest and imprisonment, inhuman torture, and negligent failure to warn that these torts might occur.[3] The district court dismissed the complaint, finding a lack of sufficient ties between the alleged tortious conduct and any commercial conduct by the Saudis.

A panel of this Court then reversed that ruling in an opinion written by Chief Judge Re of the United States Court of International Trade, sitting by designation. 923

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[3] Nelson also sued the Hospital Corporation of America in a separate action which was dismissed under the statute of limitations and for contributory negligence stemming from Nelson's submission of the falsified diploma; that ruling is now on appeal to this Court. See *Nelson* v. *Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990).

F.2d at 1536. It found jurisdiction solely under the FSIA exception for commercial activity carried on in the United States by a foreign state. *Id.* at 1533.

The panel held that the "recruitment and hiring [of Nelson] in the United States constituted a 'commercial activity' of Saudi Arabia, within the meaning of the FSIA." *Ibid.* It then stated that cases applying the FSIA require that there be a nexus "between the acts for which damages are sought, and the foreign sovereign's commercial activity." *Id.* at 1534. The panel concluded that jurisdiction was present because "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 1535.

Because there was this connection, the panel found jurisdiction under the commercial activities exception despite the fact that Nelson was complaining about police activities. *Id.* at 1534-35.

REASONS FOR GRANTING REHEARING

This is one of those rare instances in which rehearing is warranted because the panel opinion radically departs from established law and is at odds with Congress' intent. It is difficult or impossible to square the ruling here with the Court's precedent in *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980)[4], and the opinion is inconsistent with a number of decisions by other circuits interpreting the FSIA.

1. In *Arango*, the plaintiffs there sued Dominicana, a state airline, after they were refused admission to the Dominican Republic by immigration officials, and were immediately rerouted elsewhere, being manhandled in the process. This Court first dismissed the appeal, but then

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[4] See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*in banc*).

issued guidance to the district court for its further handling of the case. Dominicana contended that it could not be sued for claims arising out of the acts of Dominican immigration officials, which are not commercial in nature, even though the airline admitted that it engaged in commercial activity in the United States and had carried the Arangos to the Dominican Republic.

The Court accepted this argument because Dominicana's actions regarding the rerouting of the Arangos was not commercial; the airline was merely pressed into the service of carrying out a governmental law enforcement function: refusal to allow entrance and bodily expelling the Arangos from the Dominican Republic. 621 F.2d at 1379.

As in the case at bar, the allegedly tortious activity was certainly connected with commercial activity since Dominicana flew the Arangos to the Dominican Republic on a paid ticket. Yet, the police activity of which the Arganos complained was not cognizable in a United States court because it was sovereign in nature, and was not the activity that provided the jurisdictional nexus to the United States. By contrast, the Court permitted other causes of action by the Arangos to go forward since they challenged conduct of a commercial kind. 621 F.2d at 1379-80.

The panel ruling at bar cannot be squared with *Arango* because it permits review of foreign law enforcement conduct, which is closely analogous to the activity which the Court there held could not be reviewed in United States courts.

2. In addition to being in conflict with *Arango*, the decision here is at odds with considerable precedent from other circuits which does not permit review of inherently sovereign activity—such as law enforcement conduct—under the commercial activities exception.

The legislative history of the FSIA shows that Congress did not intend any of the various clauses of the com-

mercial activities exception to remove immunity for essentially non-commercial acts. To the contrary, the relevant discussion in the House and Senate reports makes clear that Congress intended that only actual commercial activity itself be covered within this exception. See H.R. Rep. 94-1487, 94th Cong., 2d Sess. 16, 18-19 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 18-19 (1976). Both reports speak of allowing suits for acts that are "commercial or private in nature." *Ibid.*

This congressional intent was recognized and applied by the Ninth Circuit in *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1521-22 (9th Cir.), *cert. denied*, 110 U.S. 237 (1989), a case in which the United States also filed a statement of interest in order to call the court's attention to the sovereign nature of the activity involved.

In *Gregorian*, the plaintiff claimed that a Soviet Union publication had libeled him as part of a strategy to cheat him in a commercial venture; the libel was alleged to be directly related to commercial activity. Nevertheless, the Ninth Circuit held that determination of the contents of an official newspaper is a sovereign act rather than a commercial one, despite the fact that publication of a newspaper can be commercial. Because the actual activity challenged by the plaintiff was sovereign, it was not covered by the commercial activities exception in the FSIA. *Id.* at 1522. Accord *Tucker* v. *Whitaker Travel, Ltd.*, 620 F. Supp. 578, 584 (E.D. Pa. 1985) (decision on how to "police the activities of its citizens" is "peculiarly governmental and may not be subjected to scrutiny in United States courts"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

In another case closely analogous to this one, the court in *Herbage* v. *Meese*, 747 F. Supp. 60 (D.D.C. 1990), similarly found no jurisdiction under the FSIA for claims made against agents of the British government for assertedly wrongful extradition to the United States. The court held that a British constable, detective, and prosecutor were all carrying out sovereign functions in arresting and

extraditing the plaintiff. Citing *Arango*, the court determined that there was no waiver under the FSIA for this type of governmental law enforcement conduct. This conclusion held regardless of the plaintiff's allegations that the acts taken by the British police officers were "illegal" and "heinous." *Id.* at 66-67.

Here too, there is no jurisdiction under the FSIA commercial activities exception to immunity because the acts at issue were plainly governmental. Nelson attacks the police conduct of Saudi officials in arresting and confining him. This type of conduct is clearly sovereign rather than commercial; in contrast to commercial activity, it can be carried out only by a government. It is, therefore, not covered by the FSIA commercial activities exception, regardless of whether or not it is intertwined with commercial activity.[5]

As explained in the opening section of this brief, a contrary conclusion is against congressional intent. And, it must be recognized that review of this kind of sovereign activity by a United States court would require examination of Saudi police officials here, as well as questioning in our courts their conduct of police activities in their own country. The panel's ruling is thus likely to expose the United States' own law enforcement conduct to judicial scrutiny in foreign courts.

Numerous cases make clear that it makes no difference for FSIA purposes whether the governmental activity in question is intertwined with commercial activity.

For example, in *de Sanchez*, 770 F.2d at 1391-92, the Fifth Circuit found no jurisdiction when a plaintiff sued to collect on a check issued by the Nicaraguan Central Bank for payment of a certificate of deposit payable in

[5] Nelson has also alleged a cause of action for failure to warn that he may be subjected to the type of wrongful conduct that he alleges. However, since that cause of action would require review of the sovereign police activities, the failure to warn claim should not stand on its own.

U.S. dollars. The stop payment order was made by the same Central Bank based on then-current policies regarding preservation of foreign exchange reserves. That act clearly had a nexus to the commercial activity of sale of the certificate of deposit, and the usually commercial activity of sale of foreign currency. But that connection was not sufficient because the key activity was the sovereign one of determining not to honor the payment check. Accord, *Millen Industries, Inc.* v. *Coordination Council for North American Affairs*, 855 F.2d 879, 884-85 (D.C. Cir. 1988); *MOL, Inc.* v. *The People's Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

And, in *Letelier*, the Second Circuit declined to approve execution against the Chilean national airline in a case concerning assassination of a former Chilean ambassador in the United States, and airline personnel were assertedly involved in the plot. 748 F.2d at 797. The airline clearly engaged in commercial activity here, but the act in question was a governmental one—state sponsored assassination. That act was immune under the FSIA even though airline personnel had allegedly taken actions—such as providing transportation—to make the assassination possible. *Id.* at 794. Citing this Court's decision in *Arango*, the Second Circuit focused on the allegedly wrongful activity itself, and held that any participation by the airline in the plot was not commercial in nature. *Id.* at 797-98.

The ruling here is firmly at odds with these holdings.

3. Additionally, the panel here erred in concluding that there is a sufficient connection between the allegedly tortious conduct of the Saudi police officials and the commercial activity found to occur in the United States. In finding such a connection, the panel applied an analysis rejected by other courts of appeals.

For example, in *Stena Rederi AB* v. *Comision de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991), the

Fifth Circuit made clear that FSIA jurisdiction *cannot* be based merely on activity that is intertwined with commercial activity. Rather, the court explained—relying on *Arango*—that "[i]n order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be *the activity on which the lawsuit is based.*" *Id.* at 387. Accord *ibid.* ("[b]ecause Pemex's commercial acts do not form the basis for Stena's complaints, the commercial activities exception does not apply").

Here, the commercial activity relied upon by the panel is the recruitment and hiring of Nelson in the United States. Nelson's claims are based not on those activities, but on the actions of the Saudis who jailed him. Thus, the nexus between the relevant commercial activity and the allegedly tortious conduct is *not* the same as the connection between the commercial activity and the United States. The panel confused this key difference.

CONCLUSION

For the foregoing reasons, as *amicus curiae*, the United States urges that the panel rehear this case, or that the full Court consider it *in banc*.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

(Filed July 1, 1991)

Before: EDMONDSON and BIRCH, Circuit Judges, and RE*, Chief Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

The decision in this case does not purport to address the applicability of the act of state doctrine to this case. This issue is open for the consideration of the district court on remand.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
United States Circuit Judge

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation, has retired from federal service and took no part in deciding the pertinent petition or suggestion. The petition was decided by a quorum. *See* 28 U.S.C. § 46(d); 11th Cir. R. 34-2(a).

Supreme Court, U.S.
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No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether United States courts have jurisdiction under the "commercial activity" exception in the Foreign Sovereign Immunities Act to review inherently sovereign law enforcement activities of a foreign state carried on in that country.

2. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit challenging the conduct of a foreign state where the commercial activity of that foreign state in the United States is unrelated to the non-commercial conduct forming the basis of the suit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONERS

Petitioners Saudi Arabia, King Faisal Specialist Hospital, and Royspec [1] request that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit and dismiss the Respondents' actions.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992), and is set forth in the Joint Appendix (J.A.) at 99-115. The opinion of the United States District Court for the Southern District

[1] All parties to this proceeding in the courts below are identified in the caption. In compliance with Rule 29.1 of this Court, Petitioners represent that the Kingdom of Saudi Arabia is a foreign state and that King Faisal Specialist Hospital and Royspec are owned by the Kingdom of Saudi Arabia.

of Florida, reversed by the Eleventh Circuit, is set forth at J.A. 91-98.

GROUNDS FOR JURISDICTION

The Eleventh Circuit issued its decision on February 21, 1991. The petition for rehearing and suggestion for rehearing en banc were denied by the Eleventh Circuit on July 1, 1991. The petition for a writ of certiorari was filed on September 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), including the sections codified at 28 U.S.C. §§ 1603(d), 1603(e), and 1605 (a)(2) (1988). Pertinent provisions of the FSIA are set forth in the attached statutory appendix.

STATEMENT

Respondents, Scott Nelson and his wife Vivian Nelson,[2] filed this personal injury action in 1988 against the Kingdom of Saudi Arabia; King Faisal Specialist Hospital (KFSH or the Hospital), a hospital owned by Saudi Arabia and located in Riyadh, Saudi Arabia; and Royspec, which is also owned by Saudi Arabia and serves as the Hospital's purchasing agent in the United States. It is undisputed that all three Petitioners are "foreign states" under the FSIA. 28 U.S.C. § 1603(a) & (b) (1988). Accordingly, Petitioners are immune from suit in United States courts unless jurisdiction is authorized by one of the FSIA's limited exceptions to foreign sovereign immunity. The issue in this case is whether jurisdiction exists under the first clause (Clause One) of the FSIA's "commercial activity" exception, which authorizes jurisdiction of actions "based upon a commercial activity carried on in the United States by the foreign state." § 1605(a)(2).

[2] When used in the singular herein, "Respondent" shall refer to Scott Nelson only.

Jurisdictional Facts and Allegations[3]

In September 1983, while in the United States, Respondent allegedly saw a magazine advertisement for a position as a monitoring systems engineer at KFSH in Saudi Arabia. J.A. 52. The advertisement had been placed by Hospital Corporation of America (HCA), a privately-owned corporation under contract with Saudi Arabia to assist in recruitment for the Hospital. J.A. 52. While in Saudi Arabia working for a United States corporation, Respondent interviewed for the monitoring systems engineer position with two officials of the Hospital. J.A. 57. According to his own affidavit, Respondent received an offer for the position *while still in Saudi Arabia* "and then returned to the United States to complete the processing requirements (visas, medical exam, etc.)" for the job. J.A. 57. Respondent subsequently signed a contract of employment with KFSH in Florida in November 1983, J.A. 4, and traveled to Tennessee on December 6, 1983, to attend an orientation session conducted by HCA. J.A. 57. Respondent returned to Saudi Arabia in December 1983 and commenced his employment with KFSH. J.A. 4.

Respondent concedes that he falsely represented to KFSH that he was a graduate of the Massachusetts Institute of Technology (M.I.T.). J.A. 35. He also concedes that he later submitted a forged M.I.T. diploma to KFSH. J.A. 35.[4]

[3] The following facts and allegations relevant to the FSIA jurisdictional issue are taken from the allegations in the complaint and in Respondent's affidavit of November 18, 1986, and from other materials that were before the district court on Petitioners' motions to dismiss for lack of jurisdiction. Because there was no discovery before the district court granted the motions to dismiss, Respondents' allegations of jurisdictional facts were assumed to be true solely for the purpose of the facial challenge to jurisdiction. Petitioners do *not* concede, however, that such allegations in either the complaint or Respondent's affidavit are accurate or complete.

[4] Respondent made these admissions in a related case in which Respondent sued HCA to recover for the same injuries alleged in

Respondent's contract provided that he would be employed as a monitoring systems engineer at KFSH in Riyadh, Saudi Arabia. J.A. 40. It is undisputed that his duties were to be and were performed exclusively in Saudi Arabia. Various contract terms established that the employment relationship would be governed by the laws of Saudi Arabia and the policies of KFSH. For example, Respondent was subject to taxation by Saudi Arabia during his residency in that country; compensation for any "injury or disease sustained by the Employee during or due to work" was to be paid in accordance with "Hospital policy"; and "[i]n the case of any dispute arising from this contract, the Saudi courts, authorities or commissions only will have jurisdiction." J.A. 42, 43, 47.

Respondent worked at the Hospital in Saudi Arabia for a number of months without incident. Respondent alleges that in March 1984, he discovered a defective grease valve in the oxygen and nitrous oxide lines at KFSH, which he reported to Hospital officials and officials of the Saudi government. J.A. 4-5, 52, 57-58. By August 1984, Hospital officials had discovered that Respondent appeared to have falsely represented that he was a graduate of M.I.T.[5] On September 27, 1984, Respondent was arrested by Saudi law enforcement officials. Saudi Arabia has consistently maintained that Respondent was arrested because of his misrepresentations and forgery, R. 64,[6] but Respondent claims that his reports of a safety violation at KFSH led to his arrest. J.A. 4-5.

this case. That case was resolved in favor of HCA because Respondents' claims were barred by the statute of limitations. *Nelson v. Hospital Corp. of Am.*, No. 88-0484 (S.D. Fla. Oct. 31, 1990), *aff'd mem.*, 946 F.2d 1546 (11th Cir. 1991).

[5] An August 28, 1984, KFSH memorandum entitled "A Note to be Presented to HE [His Excellency] the Counsel and Supervisor of Executive Management Relevant to the Educational Qualifications, of Mr. Scott Nelson and the Violation Committed by Him," made part of the record below, indicates that KFSH suspected that Respondent had falsified his academic credentials; that an inquiry to M.I.T. had uncovered that Respondent had not graduated on the date indicated on the diploma he had submitted; that Respondent was informed by the Hospital on or before August 21, 1984, of its concerns about his academic credentials; and that Respondent had refused to provide KFSH with an original or authenticated copy of his M.I.T. certificate. Pl.'s Ex. 4, R. 29.

Respondent alleges that upon his arrest on September 27, 1984, he was taken to the Saudi Arabia "Criminal Investigation Division," locked in a "jail cell," and thereafter "shackled, tortured and beaten" by Saudi officials "acting in their official capacity." J.A. 5, 58. According to his affidavit, this alleged physical abuse occurred for approximately one hour on the day of his arrest. J.A. 58. Respondent further alleges that on October 3, 1984, he was transported to Al-Sijan prison in Saudi Arabia "to await trial on unknown charges." J.A. 54, 59. He alleges that he was detained in a prison cell where he "slept on the floor," with "rats crawl[ing] all over," and was denied adequate food. J.A. 59. There he allegedly was "repeatedly interrogated, in Arabic, by police investigators" and was not advised of the charges against him. J.A. 5. The complaint further alleges that Respondent's family was not advised of his whereabouts for several days, and that his wife subsequently "was informed by an agent of SAUDI ARABIA that [Respondent] could be released in exchange for sexual favors." J.A. 5.

During his imprisonment, Respondent met at least twice with officials of the United States Embassy in Saudi Arabia. In an initial meeting with a United States con-

[6] It is illegal in Saudi Arabia to make false statements in a government employment application or to use forged educational diplomas. Council of Ministers Resolution No. 550 (3/11/1383 Hijra—1963 A.D.) and Royal Decree No. 53 (3/11/1383 Hijra—1963 A.D.) (defining and prohibiting forgery and false statements (Article 5) and providing for fines and up to three years in prison (Articles 6, 8 & 10)). Jurisdiction over these matters was given to the Saudi Board of Grievances by Council of Ministers Resolution No. 223 (4/8/1399 Hijra—July 10, 1979 A.D.). It is also a crime in the United States to make a false statement to the government in a job application. 18 U.S.C. § 1001 (1988); *see United States v. Tamargo*, 637 F.2d 346 (5th Cir.) (conviction under § 1001 for material omission in job application submitted to federal government), *cert. denied*, 454 U.S. 824 (1981).

sular officer on September 30, 1984, Respondent claimed that he had been "roughed up" by the arresting Saudi officials. The United States official determined, however, that "[Respondent's] allegation was not credible" because he had "no bruises or marks" and there was "no indication of undue stress." J.A. 64. In a second visit on October 9, 1984, the United States official again "found no evidence" to support Respondent's claim that he had been beaten by prison guards.[7] J.A. 64. The State Department's report based on these visits states that "[Respondent] was arrested for having presented Saudi officials with a fraudulent college degree from MIT as proof of job qualifications." J.A. 64.

On November 5, 1984, approximately thirty-nine days after his arrest, Respondent was released from prison on the order of the government of Saudi Arabia, acting in response to a request from a United States Senator. J.A. 54, 60. Respondents returned to the United States a few days later. J.A. 60-61.

Respondent testified before the House Foreign Affairs Subcommittee on Europe and the Middle East on June 15, 1987, at which time he submitted a sworn affidavit dated November 18, 1986, and sought to persuade the State Department and Congress to investigate alleged abuses by Saudi law enforcement officials. J.A. 51-66.[8] At this

[7] It is unlawful in Saudi Arabia for civil or military personnel to inflict harm of any kind on a person in custody. Public Securities Regulations of the Kingdom of Saudi Arabia, Royal Decree No. 3594, art. 231, sec. 8 dated 29/3/1369 Hijra (January 1950 A.D.), affirmed by Royal Decree No. M/31, art. 28, dated 21/6/1398 (May 1978 A.D.).

[8] During his congressional testimony, Respondent was asked repeatedly whether there was any possible explanation for his arrest other than his reports of a safety violation at the Hospital. J.A. 62-63. Respondent denied that there had been any allegation of wrongdoing on his part, J.A. 62-63, notwithstanding his awareness that his false statements concerning his academic credentials had been discovered shortly before his arrest, Pl.'s Ex. 4, R. 29, and notwithstanding that the State Department's report of its contemporaneous investigation of Respondent's detention stated that Respondent "was arrested for having presented Saudi officials with a fraudulent college degree from MIT as proof of job qualifications." J.A. 64. Respondent made no mention of his false statements or forgery in his congressional testimony.

hearing, the State Department advised Congress that it did not believe that there was any pattern of imprisonment of Americans in Saudi Arabia without cause. Pl's Ex. 7, R. 46, 129. The State Department noted that more than 40,000 United States citizens reside in Saudi Arabia, Pl's Ex. 7, R. 46, 142, and that it had received complaints of improper detention from only four United States citizens from 1983-87. J.A. 64.

Officials of the State Department and the Ambassador to the United States for the Kingdom of Saudi Arabia, His Royal Highness Prince Bandar bin Sultan, have participated in diplomatic discussions regarding these issues generally and Respondents' specific claims. J.A. 50. The Royal Embassy of Saudi Arabia in Washington has repeatedly assured Respondents that they and their counsel would be provided with visas and guaranteed safe passage to pursue the adjudication of their claims in the courts and administrative tribunals of Saudi Arabia, J.A. 50, and the Saudi Arabia Board of Grievances three times has set hearings to address Respondents' claims. Respondents have declined the offer and did not appear at the scheduled hearings.

Respondents' Complaint

In 1988, nearly four years after leaving Saudi Arabia, Respondents instituted this action against Saudi Arabia and its governmental instrumentalities, KFSH and Royspec. The complaint contains sixteen counts seeking recovery for personal injuries allegedly inflicted by Saudi government law enforcement officials in the course of Respondent's arrest and imprisonment in Saudi Arabia in September and October 1984. Ten counts of the complaint allege intentional torts. Six of these counts are directed against Saudi Arabia, alleging battery, unlawful detainment, wrongful arrest and imprisonment, inhuman torture, disruption of normal family life, and mental an-

guish, respectively, all in alleged violation of United States or international law. J.A. 6-11. Two counts alleging battery and false imprisonment, respectively, are also asserted separately against KFSH and against Royspec. J.A. 15, 19-20.

The complaint also contains three negligence counts, one against each Petitioner, which allege breach of a supposed duty to warn Respondent of "the hidden dangers associated with [his] employment." J.A. 5-6, 14, 18-19. Respondent claims that Petitioners knew or should have known that "officials of the Saudi government, and officials of Saudi institutions such as KFSH, have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause," and that "KFSH would be likely to take severe retaliatory action against [Respondent] if he reported and/or attempted to remedy, and/or disclosed to others any health-related or other hazards or problems which he discovered in KFSH." J.A. 6. Respondent alleges that each Petitioner negligently failed to warn him, during his recruitment or employment, of these alleged dangers.

The complaint's three remaining counts assert derivative claims on behalf of Respondent's wife, Vivian Nelson, against each of the three Petitioners. She claims to have suffered loss of consortium, loss of support, and similar injuries as a result of Petitioners' alleged mistreatment of her husband. J.A. 11-12, 16, 20.

The complaint does not include any breach of contract claim. Indeed, Respondent has affirmatively asserted that his claims are *not* "disputes relating to the contract," R. 29, 7, presumably for at least two reasons. First, the employment contract provides that "[i]n the case of any dispute arising from this contract, the Saudi courts, authorities or commissions *only* will have jurisdiction." J.A. 47 (emphasis added). Second, the contract provides that Respondent could be discharged for, *inter alia*, "resorting to forgery to obtain employment." J.A. 44.[9]

[9] Respondent's effort to disassociate his claims from the employment contract is at odds with his assertion, adopted by the Eleventh Circuit, that jurisdiction of these claims exists under the FSIA's "commercial activity" exception. The supposedly relevant "commercial activity" relied upon by the Eleventh Circuit consisted solely of the recruitment, hiring, and employment of Respondent. J.A. 113. Thus, were this Court to find jurisdiction in this case, Respondent would be left to argue anomalously that his claims are "based upon" the employment relationship (the only identified "commercial activity"), but do not "arise from" the employment contract.

Proceedings in the District Court

In September 1988, four years after leaving Saudi Arabia, Respondents filed their complaint in the United States District Court for the Southern District of Florida. Petitioner Royspec moved to dismiss the complaint for lack of subject matter jurisdiction and venue under the FSIA. Petitioners Saudi Arabia and KFSH jointly moved to dismiss for lack of subject matter jurisdiction and venue under the FSIA and also sought dismissal on the ground that the claims were barred by the "act of state" doctrine. Respondents opposed the motions by arguing, *inter alia*, that jurisdiction existed under Clause One of the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2) (1988).

By memorandum opinion filed August 11, 1989, the district court dismissed the complaint against all three Petitioners for lack of subject matter jurisdiction under the FSIA. J.A. 98. In holding that Saudi Arabia and KFSH were immune from suit, the court declared that the FSIA's "commercial activity" exception was inapplicable for two reasons. First, the FSIA defines "commercial activity carried on in the United States by a foreign state" as commercial activity having "substantial contact with the United States." 28 U.S.C. § 1603(e) (1988). The district court found that the commercial activity of the Hospital and Saudi Arabia did not have "substantial contact with the United States," even if HCA's recruiting activities with respect to Respondent were imputed to them. Emphasizing that "[Respondent] was interviewed by KFSH in Saudi Arabia" and that "the employment contract was to be performed in Saudi Arabia," the district court con-

cluded that "substantial contact with the United States" under the FSIA requires more significant activity than the "fortuitous happenstance" that Respondent signed the employment contract in Florida. J.A. 95.

Second, the district court concluded that even if these recruitment activities were viewed as having "substantial contact" with the United States, Respondents' claims were not "based upon" that commercial activity under Section 1605(a)(2). J.A. 96. The court observed that Respondents had not alleged "some type of commercial cause of action arising from the employment contract"; rather, the "gravamen of [Respondent's] complaint . . . is an action for personal injuries." J.A. 97. Respondents' only argument for jurisdiction was that "but for [Respondent's] recruitment in the United States, [Respondent] would not have taken the job, been arrested, and suffered the personal injuries"—a connection the district court found "far too tenuous to support jurisdiction over a foreign sovereign." J.A. 97. The court similarly held that Respondents' negligent failure to warn claims were not based upon Petitioners' commercial acts in the United States, noting that Respondents had not alleged that Respondent was recruited "for the purpose of imprisoning and torturing U.S. citizens." J.A. 97.

With respect to Royspec, the district court determined that although Royspec's commercial activity (purchasing equipment and medical supplies for KFSH) had "substantial contact with the United States," "[t]he only connection between Royspec and [Respondent] is that [Respondent] was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." J.A. 96. The court thus dismissed the action against Royspec for lack of jurisdiction under the FSIA because there was "absolutely no nexus between Royspec's business and the torts alleged in [Respondents'] complaint." J.A. 96.

Proceedings in the Court of Appeals

The Court of Appeals for the Eleventh Circuit reversed, holding that the FSIA's "commercial activity" exception

created jurisdiction over all three Petitioners for all of Respondents' claims. J.A. 115. The court of appeals held that "when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity," the claim is "based upon" commercial activity. J.A. 109. The court thus interpreted the FSIA's "commercial activity" exception to permit a United States court to adjudicate claims alleging injury from the *non-commercial, governmental* acts of a foreign state, as long as there is some connection ("nexus") between those acts and other commercial activity.

With respect to Saudi Arabia and KFSH, the court of appeals held that such a nexus existed because the arrest and imprisonment of Respondent "resulted from and [was] directly attributable to [Respondent's] employment." J.A. 113. The court reasoned that whether Respondent was arrested and detained for performing his job duties at KFSH or for his false statements and forgery, the arrest and detention were related to his employment. J.A. 113-14. Asserting that the recruitment and hiring of Respondent "was part of a process having 'substantial contact with the United States,'" J.A. 109, the court held that "the detention and torture of [Respondent] are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States." J.A. 113.[10] The court of appeals also found a sufficient "jurisdictional nexus" between Royspec's commercial activity in the United States and Respondents' claims. J.A. 114.

Petitioners requested rehearing or rehearing en banc, and the United States filed a statement in support of rehearing. After the rehearing requests were denied, Petitioners timely filed a petition for a writ of certiorari, and the United States filed a statement in support of review. The petition was granted on June 8, 1992.

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[10] The court of appeals did not reach Petitioners' argument for dismissal under the "act of state" doctrine. J.A. 114.

SUMMARY OF ARGUMENT

Petitioner Saudi Arabia is a foreign state. Petitioners KFSH and Royspec are instrumentalities of Saudi Arabia and therefore are also "foreign states" under the FSIA. 28 U.S.C. § 1603(a) & (b) (1988). Accordingly, the FSIA is the exclusive source of jurisdiction over Petitioners in the United States courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA establishes a presumption that foreign states are immune from suit unless one of the limited statutory exceptions applies. 28 U.S.C. § 1604 (1988).

The Eleventh Circuit found that Clause One of the FSIA's "commercial activity" exception, which permits jurisdiction where the action is "based upon a commercial activity carried on in the United States by the foreign state," § 1605(a)(2), confers jurisdiction over this case. Notwithstanding that Respondent's injuries are alleged to have occurred entirely in Saudi Arabia as a result of arrest, imprisonment and alleged mistreatment by Saudi government law enforcement officials, the Eleventh Circuit applied the "commercial activity" exception because these acts allegedly had a "nexus" with Respondent's employment in Saudi Arabia and his alleged recruitment and hiring in the United States. This assertion of jurisdiction over claims involving a foreign state's police actions committed wholly within its sovereign territory is unprecedented, and should be overturned for at least two reasons.

First, Respondents' claims are not "based upon commercial activity" within the meaning of the FSIA. Police brutality, wrongful arrest and imprisonment, and similar alleged abuses of a foreign state's police power cannot possibly be characterized as "commercial activity," but rather involve governmental acts of precisely the kind that Congress expressly intended to immunize from suit in United States courts. Although recognizing that such acts are not commercial, the Eleventh Circuit adopted a contorted and unduly expansive construction of the statutory phrase "based upon" to find jurisdiction over such

inherently governmental acts because of their supposed "nexus" with Respondent's employment. This holding deviates from the plain and ordinary meaning of the statutory term "based upon," which requires not just a "nexus" with commercial activity, but that the foundation or basis of the suit—*i.e.*, the acts complained of by the plaintiff—be commercial. Moreover, by authorizing jurisdiction over non-commercial sovereign acts because of their supposed commercial motivation, the Eleventh Circuit violated Section 1603(d)'s express mandate that "[t]he commercial character of an activity shall be determined by reference to the nature of [the act], rather than by reference to its purpose." *See Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992). The Eleventh Circuit's interpretation erroneously confuses the two distinct inquiries required under Clause One: (1) whether the acts complained of (*i.e.*, the basis of the complaint) are commercial in nature; and (2) whether such commercial acts have substantial contact with the United States. If the first inquiry reveals that the *nature* of the acts in dispute is governmental rather than commercial, jurisdiction cannot exist under Section 1605(a)(2) regardless of those acts' connection to other commercial activity.

The court of appeals' interpretation also contravenes the FSIA's core purpose of codifying the "restrictive" principle of foreign sovereign immunity, under which foreign states are immune from suits involving their public acts but not from suits involving their commercial or private acts. The legislative history demonstrates that Congress intended to confer jurisdiction when a foreign state acts as a "merchant" and a dispute involves that state's "commercial obligations," but to retain foreign sovereign immunity from suits challenging a foreign state's public acts taken within its own territory. The retention of the core principle of restrictive foreign sovereign immunity was grounded in Congress's desire to avoid interfering with the internal affairs of foreign governments, which could have adverse consequences for United States foreign relations and the reciprocal treatment of the United

States in foreign courts. Such concerns are starkly implicated here because this case would require a United States court to conduct an intrusive inquiry in an effort to adjudge the lawfulness of Saudi Arabia's procedures for arrest and interrogation, its prison conditions, and other essential characteristics of its sovereign law enforcement system.

Second, even if the complaint could be said to be based upon commercial activity insofar as the claims allegedly relate to Respondent's employment in Saudi Arabia, such commercial activity did not have the necessary "substantial contact with the United States." 28 U.S.C. § 1603(e) (1988). Every act of potential significance to Respondent's claims—*e.g.*, Respondent's performance of the employment contract, his reporting of alleged safety violations at KFSH, his arrest and imprisonment, and his alleged injuries from mistreatment in prison—occurred solely in Saudia Arabia. None of the claims depends on proof of *any* of the few minor events alleged to have occurred in the United States, such as his reading of the job advertisement or his signing of the employment contract. Because these incidental acts in the United States are factually and legally irrelevant to Respondents' claims, the activity in Saudi Arabia on which the claims are based lacks the "substantial contact" with the United States necessary to create jurisdiction over Petitioners under Clause One of Section 1605(a)(2). In addition, jurisdiction over Respondents' claims against Royspec must fail for the further reason that the record is undisputed that Royspec had absolutely no involvement with any activity on which Respondents' claims are even arguably based. The decision of the court of appeals in this case should be reversed and Respondents' actions should be dismissed.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE NOT "BASED UPON COMMERCIAL ACTIVITY" UNDER CLAUSE ONE OF 28 U.S.C. § 1605(a)(2)

Since 1952, the governing principle of foreign sovereign immunity in the United States courts has been that foreign states are subject to suit only for their private or commercial acts (*actiones jure gestionis*), not for their public or sovereign acts (*actiones jure imperii*). This "restrictive" principle of foreign sovereign immunity was followed as a matter of State Department policy for almost twenty-five years, and was codified in the FSIA in 1976. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). The FSIA's "commercial activity" exception was designed specifically to embody this principle of preserving immunity for internal governmental actions of a foreign state, while limiting immunity for foreign state acts of a commercial nature. *See Weltover*, 112 S. Ct. at 2165 ("[T]he Act (and the commercial exception in particular) largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952."); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) [hereinafter House Report] (FSIA intended to preserve immunity in "cases involving acts of a foreign state which are sovereign or governmental in nature").

The court of appeals' decision undermines this core congressional purpose by requiring Saudi Arabia to appear in a United States court to defend the manner in which it enforces its laws and exercises its police power within its own borders. The acts that form the basis of Respondents' claims—that Saudi law enforcement officials, "acting in their official capacity," "summarily arrested, detained, and physically abused" him in Saudi Arabia "without legal cause," J.A. 6—cannot be characterized as "commercial activity" under either a common sense interpretation or the statutory definition of the term. The FSIA provides that "[t]he commercial character of an activity shall be determined by reference to

the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*," 28 U.S.C. § 1603(d) (1988) (emphasis added); a foreign state thus acts commercially under the FSIA only when it acts "in the manner of a private player" within a market by performing "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 112 S. Ct. at 2166 (emphasis in original) (citation omitted). Regardless of whether they relate to a commercial *purpose*, a foreign state's actions such as arrest, interrogation, imprisonment, and physical punishment are plainly actions of a governmental rather than a commercial *nature*.[11] Accordingly, this suit should be dismissed because the acts that allegedly injured Respondents—*i.e.*, the acts their claims are "based upon"—are non-commercial, public acts that cannot support jurisdiction under Clause One.[12]

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[11] As explained more particularly at pp. 36-38 *infra*, because Respondents' duty to warn claims would entail proof of the same injuries from the same inherently non-commercial acts at issue in the remainder of the complaint, these negligence claims also cannot be adjudicated under the "commercial activity" exception.

[12] The lower courts have uniformly characterized the exercise of the police power by a foreign state as sovereign rather than commercial conduct under the FSIA. *See, e.g., Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (stating in dicta that claims of battery and false imprisonment against state-owned airline which detained and involuntarily rerouted plaintiffs are based upon sovereign conduct); *Herbage v. Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990) ("From the constable carrying out the arrest, to the detective, to the prosecutor, these defendants were performing official government functions, classically belonging to the discretion of the executive, and classically immune from suit") (footnoted omitted), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 584 (E.D. Pa. 1985) ("[D]ecisions whether and how to . . . police the activities of [a foreign state's] citizens . . . are peculiarly governmental"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1064 (E.D.N.Y. 1979) ("governmental, public or sovereign enterprises" include "running police departments"). *See also* H. Lauterpacht, *The Problem of Jurdisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l Law 220, 237 (1951) ("there must be immunity from jurisdiction in respect of the executive and administrative acts of the foreign state within its territory, such as . . . wrongful imprisonment or, generally, denial of justice").

The court of appeals sought to sidestep this ineluctable conclusion by expansively interpreting "based upon" essentially to mean "in connection with" or "relating to." In the court's view, jurisdiction exists under Clause One of the "commercial activity" exception to adjudicate claims alleging injury from incontrovertibly *non-commercial* and *governmental* acts of a foreign state so long as those "acts for which damages are sought" have a so-called "jurisdictional nexus" with other commercial activity of the foreign state. J.A. 109. The court recognized that the "acts for which damages are sought" by Respondents in this case (*e.g.*, arrest, imprisonment, and torture) are *not* commercial acts, but asserted that Respondent's claims involving such acts "are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital." J.A. 113. For the reasons set forth below, this conclusion contravenes the plain language and structure of the FSIA, the legislative history, and the underlying statutory purposes, all of which demonstrate that jurisdiction under Clause One is limited to claims where the injurious acts in dispute are themselves commercial in nature.[13]

A. The Eleventh Circuit's Holding Contravenes The Plain Meaning And Structure Of The FSIA's "Commercial Activity" Exception

The construction of a federal statute must begin, of course, with the plain meaning of the statutory language. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). Further, any construction of the FSIA should be informed by this Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes,"

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[13] Clause One of § 1605(a)(2) is the sole jurisdictional basis on which Respondents have relied in this case. J.A. 93, 107.

Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1958), as well as by the principle that waivers of immunity should be strictly construed, *see Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (court "must construe waivers [of immunity] strictly in favor of the sovereign . . . and not enlarge the waiver 'beyond what the language requires.'") (citation omitted).

Petitioners' interpretation of Clause One of the "commercial activity" exception adheres to these principles by giving effect in a straightforward manner to the actual language chosen by Congress: jurisdiction is limited to suits "based upon commercial activity," *i.e.*, suits where *commercial acts* of the foreign sovereign are the *basis* of the plaintiff's claims. "Based upon" is not defined in the FSIA, but its meaning is simple and clear. The word "based" means "having as a base." Webster's Third New International Dictionary 181 (4th ed. 1976). "Base" means "the bottom of something considered as its support; that on which something rests or stands; foundation," and "basis" means "the bottom of anything considered as a foundation for the parts above" and "the principal component of anything; fundamental ingredient." *Id.* at 180, 182. In this plain and ordinary sense, the "base" or "basis" or "foundation" or "fundamental ingredient" of a civil action can only be the act or acts that allegedly caused the injury for which the plaintiff seeks to recover damages. Thus, the natural reading of Clause One is that jurisdiction exists only where the damage-causing acts complained of are themselves commercial acts. Respondents' claims therefore cannot fall within the "commercial activity" exception because the acts that allegedly injured him—wrongful arrest, imprisonment, and mistreatment in prison by Saudi law enforcement officials acting in their official capacity—are inherently non-commercial, governmental acts.

The court of appeals rejected this common sense understanding of "based upon." It concluded that for jurisdiction to exist under Clause One of Section 1605(a)(2), the "acts for which damages are sought" (*i.e.*, the injurious acts actually at issue in the suit) need not themselves be commercial, but rather need only have a "nexus" with other commercial activity of the foreign state. J.A. 109-11. This expansive and unnatural interpretation of "based upon" is untenable for several reasons.

First, such a concept of "nexus"—which connotes merely a "connection" or "tie" or "link," Webster's Third New International Dictionary 1524 (4th ed. 1976)—is incompatible with the plain and ordinary meaning of "based upon" as discussed above. The terms "nexus with" and "based upon" are not comparable; saying that X has a connection or link with Y is entirely different from saying that X is based upon Y. Indeed, in Clauses Two and Three of the "commercial activity" exception, Congress expressly provided for jurisdiction over actions "based upon . . . an act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere" or "based upon . . . an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1988) (emphasis added). This demonstrates not only that Congress understood the meaning of "based upon" to differ from "in connection with," but also that Clause One could easily have been crafted to provide explicitly that immunity does not exist for actions "in connection with a commercial activity carried on in the United States," had Congress so intended.[14] The natural

[14] The Eleventh Circuit's strained construction of "based upon" to mean "in connection with" or "having a nexus with" also creates serious interpretive problems in Clause Two of § 1605(a)(2), which as noted above is also modified by the "based upon" language. Under that construction, Clause Two would permit jurisdiction whenever an action "has a nexus with an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." By creating the possibility that jurisdiction could exist even where both the act complained of and the commercial activity occurred outside the United States, such a construction would impermissibly negate Clause Two's clear purpose of limiting jurisdiction to cases where the damage-causing commercial act was itself

inference is that "based upon commercial activity" was intended to mean more than a mere "nexus" or "connection" with commercial activity. *See Melkonyan v. Sullivan*, 111 S. Ct. 2157, 2161 (1991) (when Congress chooses language different from that selected in another part of the same statute, Congress presumably intended a different meaning).

Second, to construe the "based upon" language to permit jurisdiction over non-commercial, public acts of a foreign state, as long as they have a "nexus" with commercial activity, would contravene the FSIA's explicit mandate that the distinction between commercial and governmental acts must turn on the *nature* of the foreign state's conduct, not its *purpose*. In defining "commercial activity," the statute provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1988). If a foreign state performs acts of an inherently commercial nature, those acts are "commercial activity" regardless of whether they were carried out for an entirely sovereign or public purpose. *Weltover*, 112 S. Ct. at 2166. Similarly, if a foreign state performs acts of an inherently governmental nature, those acts do *not* constitute "commercial activity" regardless of whether they were carried out solely for a commercial purpose.

In contravention of this statutory mandate, the court of appeals authorized jurisdiction over the inherently non-commercial and governmental acts of Saudi Arabia that are alleged to have injured Respondents, precisely on the theory that those acts were carried out for a commercial purpose. The court reasoned that whether Respondent's

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performed in the United States. *See* House Report at 19, discussed in text at p. 25 *infra*. *See, e.g., Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 388 (5th Cir. 1991) (Clause Two did not support jurisdiction over breach-of-contract action because the acts allegedly performed in the United States "clearly [did] not form the basis for [the] complaint[].").

detention and alleged mistreatment occurred because he reported a safety violation at the Hospital (as he contends) or because of his false statements and forgery (as Petitioners contend), those acts were related to his employment and therefore were undertaken for commercial reasons. J.A. 113-14. This reasoning eviscerates the statute's plain specification that any commercial motivation for the actions allegedly taken by Petitioners against Respondent must be disregarded as irrelevant, "[h]owever difficult it may be in some cases to separate 'purpose' (*i.e.*, the *reason* why the foreign state engages in the activity) from 'nature' (*i.e.*, the outward form of the conduct that the foreign state performs . . .)." *Weltover*, 112 S. Ct. at 2167 (emphasis in original). By looking to the supposed "nexus" between the foreign state's public acts and its commercial motivation for those acts, the Eleventh Circuit's test makes the foreign state's supposed commercial purpose—the "why"—re-emerge as the decisive jurisdictional factor. The Act's definition of "commercial activity" thus becomes substantially irrelevant: even if a foreign state's inherently governmental acts are not "commercial activity," jurisdiction over those sovereign acts is asserted anyway because of their "nexus" with the state's commercial purposes.[15] Such a judicial modification of the key element of the statutory framework cannot be accepted.

At bottom, the Eleventh Circuit's "jurisdictional nexus" analysis confuses the two distinct inquiries mandated by Clause One of Section 1605(a)(2): (1) whether the action is "based upon commercial activity," *i.e.*, whether the specific foreign state conduct at issue is com-

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[15] This approach also is an overtly jurisdiction-maximizing approach. Where a foreign state acts in a commercial manner, the underlying purpose is ignored and jurisdiction is established (as Congress provided). But where a foreign state acts in a governmental manner, the underlying purpose *is* looked to in an effort to create jurisdiction by connecting the acts to a commercial motivation. The language of the "commercial activity" exception cannot support such a reading biased in favor of jurisdiction over foreign sovereigns.

mercial in nature, and (2) whether such commercial activity has "substantial contact with the United States" as provided in Section 1603(e). Although this latter inquiry has been described as involving a "nexus" analysis, it arises only where the acts complained of are *clearly commercial in nature*, and the issue is whether those commercial acts (which may have occurred wholly or primarily outside of the United States) have a sufficient *geographical* nexus (*i.e.*, have "substantial contact") with the United States. *See, e.g., Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991) (finding no jurisdiction because the specific commercial acts forming the basis of the suit—breach of contract and negligent misinterpretation—occurred solely in Mexico and Sweden and had no nexus with the commercial activity in the United States); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 819-20 (3d Cir. 1981) (finding jurisdiction of claim because commercial acts at issue—sailing of ship into United States ports and loading and unloading of cargo there—had a sufficient nexus with the United States), *cert. dismissed*, 455 U.S. 929 (1982). However, none of the many lower court decisions involving the "commercial activity" exception has applied a "jurisdictional nexus" test in the fundamentally different sense employed by the Eleventh Circuit to recognize jurisdiction over non-commercial, public acts on a theory that they relate to other commercial activity. Rather, courts have routinely determined that if the specific conduct on which the claims are based—*i.e.*, the "gravamen" of the complaint—does not constitute "commercial activity," the jurisdictional inquiry under Section 1605(a)(2) is at an end. *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (If the "particular behavior" "is not 'commercial,' it satisfies none of the three clauses of § 1605(a)(2), and the foreign state is . . . immune from suit."), *cert. denied*, 454 U.S. 1148 (1982).

This statutorily-mandated approach was well stated by the Fifth Circuit in *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985):

> In ascertaining whether the commercial activity exception applies, three questions are involved. First, we must define with precision the relevant activity . . . In particular, we must isolate those specific acts of the named defendant that form the basis of the plaintiff's suit . . . . Second, we must determine whether the relevant activity is sovereign or commercial—a label which depends on the nature of the activity rather than on its purpose . . . . Finally, if the activity is commercial in nature, we must determine whether it had the requisite jurisdictional nexus with the United States.

Id. at 1391 (citations omitted) (footnote omitted). Applying this test, the court determined that the foreign state bank's issuance of a check and subsequent refusal to honor the check were sovereign in nature because the bank had issued the check as part of "its official role of regulating the sale of foreign exchange," and held that the bank was immune from suit notwithstanding that the bank had issued the check in connection with other commercial activity. *Id.* at 1393-95.

Numerous other courts have similarly concluded that if the foreign state act at issue is governmental in nature, jurisdiction cannot exist under Section 1605(a)(2) regardless of whether the act has any nexus to commercial activity. *See, e.g., Gregorian v. Izvestia*, 871 F.2d 1515, 1521 (9th Cir.) ("commercial activity" exception did not confer jurisdiction over a claim alleging that *Izvestia*, an official publication of the Soviet Union, had libelled the plaintiff to avoid contractual obligations, because "plaintiffs' characterization of the alleged libel as 'commercial' rests on 'reference to its purpose,'" whereas "[t]he *nature* of the *Izvestia* article . . . is clearly governmental") (emphasis in original), *cert. denied*, 493 U.S. 891 (1989); *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) ("commercial activity" exception did not confer jurisdiction over claims of misrepresentation in connection with plaintiff's commercial investment in foreign state because the act complained of—a change in Taiwan's customs law—was governmental

in nature); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328, 1329 (9th Cir.) (stating that the "crucial step" in the analysis "is defining the 'act complained of here'" and deciding "whether that act is commercial or sovereign," and finding no jurisdiction over a United States corporation's claim based on Bangladesh's termination of a licensing agreement for the export of rhesus monkeys, notwithstanding the termination's commercial effects, because Bangladesh's "right to regulate its natural resources" was "a uniquely sovereign function"), *cert. denied*, 469 U.S. 1037 (1984).

This analysis has also been applied specifically to conclude that a foreign state's exercise of the police power within its own borders cannot be adjudicated under the "commercial activity" exception.[16] *See, e.g., Arango v. Guzman Travel Advisers Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (stating in dicta that the "commercial activity" exception cannot confer jurisdiction over claims of false imprisonment and battery against a foreign state-owned airline that detained and involuntarily rerouted plaintiffs); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578 (E.D. Pa. 1985) ("commercial activity" exception does not confer jurisdiction over claims against Bahamian government for failure to regulate horseback riding and investigate related accidents because "[s]uch decisions are peculiarly governmental and may not be subject to scrutiny in the United States courts"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Magnus Elecs., Inc. v. Royal Bank of Canada*, 620 F. Supp. 387, 390 (N.D. Ill. 1985) (Section 1605(a)(2) does not confer jurisdiction over claims of fraud and conversion based upon seizure of goods by government

[16] *See also Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (refusing to permit execution under 28 U.S.C. § 1610(a)(2), an FSIA exception to immunity paralleling the "commercial activity" exception, because the alleged state-sponsored terrorism at issue (assassination and assault and battery) was not conducted "as a merchant in the marketplace" but rather was "governmental" conduct that is immune from suit regardless of its connection to commercial activity), *cert. denied*, 471 U.S. 1125 (1985).

agents because "[w]hatever else Argentina's alleged conduct may be termed, it is not 'commercial activity'"); *Perez v. The Bahamas*, 482 F. Supp. 1208, 1210 (D.D.C. 1980) ("commercial activity exception does not apply" to claims of attempted murder and piracy based upon "[p]olice enforcement of Bahamian fishing law"), *aff'd*, 652 F.2d 186 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981).

For all of these reasons, the language of Section 1605(a)(2) and the structure of the FSIA as a whole cannot support the Eleventh Circuit's broad jurisdictional construction. The "commercial activity" exception to sovereign immunity applies only when the allegedly injurious acts of the foreign state are commercial in nature. If such acts instead are governmental in nature, Section 1605(a)(2) does not create jurisdiction regardless of whether they were taken in connection with the foreign state's commercial interests. In this case, because the nature of the alleged wrongful acts of Petitioners unquestionably is governmental rather than commercial, these acts are *per se* immune from suit under the "commercial activity" exception.

B. The Legislative History Of The FSIA Confirms Petitioners' Reading Of The Plain Language Of The "Commercial Activity" Exception

Because the ordinary meaning of the FSIA's "based upon commercial activity" language cannot support the assertion of jurisdiction over Petitioners in this case, the judicial inquiry need go no further. This Court has long held that "[t]he strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances when a contrary legislative intent is clearly expressed." *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (citations and internal quotations omitted). Here the legislative history not only fails to undercut the straightforward meaning of the statutory language, but in fact confirms that Congress did not intend the "commercial activity" exception to per-

mit United States courts to adjudicate claims involving the public acts of a foreign sovereign in its own territory.

Congress's primary purpose in enacting the FSIA was to codify the "restrictive" principle of sovereign immunity, under which a foreign state retains immunity in "cases involving acts . . . which are sovereign or governmental in nature," but is subject to suit in cases involving acts "which are either commercial in nature or . . . which private persons normally perform." House Report at 14. The centrality of this public versus private acts distinction was reiterated repeatedly throughout the legislative history materials.[17] *See, e.g., id.* at 7, 8; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 25, 26 (1976) [hereinafter House Hearings] (statement of Monroe Leigh, U.S. Dep't of State Legal Adviser); *id.* at 30 (statement of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, U.S. Dep't of Justice).

The "commercial activity" exception was the key statutory vehicle for implementing this fundamental distinction. As explained by the executive branch officials responsible for preparing and presenting the draft legislation the underlying premise was as follows:

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Id. at 27 (statement of Monroe Leigh). Subjecting a foreign state to suit involving its commercial obligations was deemed consistent with the retention of foreign sovereign immunity for governmental acts:

[17] The Senate Report is identical to the House Report.

> [I]t is manifest now that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations.

Id. at 30 (statement of Bruno Ristau).

Congress also emphasized that "it is the essentially commercial nature of an activity or transaction that is critical" in determining when the "commercial activity" exception abrogates sovereign immunity. House Report at 16. The legislative history explains that claims based on commercial acts may be heard in United States courts even if the acts were undertaken for a governmental purpose, such as when a foreign state enters into contracts to purchase equipment for its armed forces or to construct a government building. *Id.* Equally clear from the legislative history, however, was that any claim involving *public* acts would *not* be justiciable in the United States under the "commercial activity" exception. By emphasizing that foreign states could be sued when acting "as a merchant," Congress sought to ensure that immunity would continue to be recognized when foreign states acted as sovereigns.

The State Department Legal Adviser testified, for example, that the purpose of restrictive sovereign immunity "is to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts." House Hearings at 27 (statement of Monroe Leigh). *See also* House Report at 17 (foreign state's burden of proving immunity encompasses proof "that the plaintiff's claim relates to a public act of the foreign state"). None of the legislative history's many examples of suits permissible under the "commercial activity" exception indicates that any public acts, much less such inherently governmental conduct as arrest and imprisonment, may be adjudicated in the United States if carried out for commercial reasons. The

legislative history emphasizes repeatedly that whether an act has a commercial nature or a governmental nature will be decisive in determining the applicability of the "commercial activity" exception. For example, the State Department Legal Adviser stated:

> The substantive provision on commercial activities appears in section 1605(a)(2). However, the definition of a "commercial activity" is of central importance and it appears in section 1603, the definition section. Under the definition, one determines whether an act is commercial by looking at its "nature" and not at its "purpose."

House Hearings at 27 (statement of Monroe Leigh). Similarly, when asked how the bill would distinguish between commercial and public activity, the Legal Adviser replied that the question "goes to the heart of this," noted that "the courts would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments," and concluded that any difficulties in applying the distinction would need to be resolved by the courts on a case-by-case basis. *Id.* at 53.

Indeed, the House Report makes clear that all three clauses of Section 1605(a)(2) are limited to actions where the conduct complained of is *commercial in nature*. For example, Clause Two provides jurisdiction over any action "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2) (1988). The House Report describes Clause Two as providing "expressly for the case where a claim arises out of a specific act in the United States *which is commercial or private in nature* and which relates to a commercial activity abroad. It should be noted that *the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.*" House Report at 18 (emphasis added). This statement confirms both that "based upon" does not embody a mere "nexus" principle and that jurisdiction exists under Section 1605(a)(2) only where the specific acts complained of are commercial in nature.[18]

In sum, the legislative history confirms that the FSIA was intended to preserve the distinction between *actiones jure gestionis* and *actiones jure imperii* that was at the heart of the restrictive theory of sovereign immunity followed by the State Department since 1952.[19] *See Weltover*,

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[18] Congress provided a separate and limited exception for non-commercial torts committed entirely in the United States, 28 U.S.C. § 1605(a)(5) (1988), which was intended principally to address the problem of traffic accidents committed in the United States by foreign states or their employees. House Report at 20. Because this exception excludes claims "arising out of malicious prosecution" or "abuse of process," even if such torts occur entirely in the United States, § 1605(a)(5)(B), it is especially difficult to believe that Congress intended Respondents' causes of action, which are clearly predicated upon an alleged abuse of legal process occurring abroad, *see Mundt v. United States*, 611 F.2d 1257, 1259 (9th Cir. 1980), to be adjudicated in United States courts under the "commercial activity" exception. *See Gregorian*, 871 F.2d at 1522 n.4 (foreign states are completely immune from claims involving malicious prosecution or abuse of process regardless of any connection between the conduct forming the basis of those claims and the foreign state's commercial activity).

[19] Because Congress drafted the "commercial activity" exception with reference to the body of existing law dealing with this fundamental distinction between public and private activities of a sovereign state, "[t]he meaning of 'commercial' [in the FSIA] is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." *Weltover*, 112 S. Ct. at 2165. Prior to 1976, foreign states were not subjected to suit in the United States for claims involving the exercise of the police power within their own borders, regardless of any connection of that conduct to commercial activity. *See, e.g.*, Benton v. Cuban Air Force, Appendix, Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (M. Sandler, D. Vagts and B. Ristau eds.) *in Digest of United States Practice in International Law*, 1045-46 [hereinafter *Decisions*] (recognizing Cuba's immunity from suit alleging that plaintiff was detained and interrogated at the Havana airport by an armed guard of the Cuban Air Force and had a considerable sum of U.S. currency confiscated from him); *Kendall v. Kingdom of Saudi Arabia*, *Decisions*, at 1053-54 (determining that Saudi Arabia should be immune from

112 S. Ct. at 2165. Both the specific words and the overarching tenor of the House Report and the statements of the legislation's drafters leave no doubt that jurisdiction under Section 1605(a)(2) was intended to be exercised only where the foreign state appears "in the marketplace as a merchant" and the claimant seeks to hold the foreign state "liable on its commercial obligations." House Hearings at 30 (statement of Bruno Ristau). The version of the "commercial activity" exception proffered by Respondents and accepted by the Eleventh Circuit is vastly broader in scope, for it would permit the United States courts to adjudge a foreign sovereign liable for its acts not as merchant but as policeman, investigator, and jailor. Had Congress even remotely contemplated such a prospect, the legislative history surely would have reflected consideration of the implications of such a potentially sensitive intrusion into a foreign state's internal affairs.[20] Because

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suit in which plaintiffs alleged personal injury and property damage after their plane had been fired on by Saudi militiamen in the Gulf of Aqaba). More generally, in applying the restrictive principle, both the State Department and the courts consistently recognized that a foreign state retained immunity for its public acts. *See, e.g., Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (stating that "strictly political or public acts" which are immune from suit include "internal administrative acts, such as the expulsion of an alien"), *cert. denied*, 381 U.S. 934 (1965).

[20] In *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), *cert. denied*, 469 U.S. 881 (1984), in which a former hostage sued Iran for injuries inflicted in its seizure and detention of American hostages, the plaintiff sought jurisdiction under § 1605(a)(5) on a theory that the alleged torts occurred entirely in the United States because they took place within the United States Embassy in Iran. In dismissing the suit, the D.C. Circuit observed that the plaintiff's argument was profoundly inconsistent with the FSIA's legislative history and purposes:

> Another reason for finding that sovereign immunity exists here is the series of unhappy consequences that would follow if we read [the Act] broadly to cover areas in which the United States had jurisdiction of any sort. These consequences would entail not only serious inconvenience and injustice but also embarrassment to our foreign relations. We offer these considerations not as policies we choose but as throwing light on congressional intent. *If Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country.* *Id.* at 841 (emphasis added).

the exercise of such jurisdiction is contrary to the entire weight of the legislative history, as well as to the statutory language, it must be rejected.

C. The Court Of Appeals' Statutory Construction Conflicts With The FSIA's Underlying Purpose Of Immunizing Foreign States From Suits Concerning The Propriety Of Their Public Acts

A final flaw in the court of appeals' "jurisdictional nexus" standard is that it contravenes the central purpose of the restrictive principle of foreign sovereign immunity by opening the door to a severe judicial intrusion into the internal affairs of foreign states, with potentially damaging repercussions to United States foreign relations and the treatment of the United States in foreign courts. Avoiding such adverse consequences has long been a central underpinning of both the absolute and restrictive principles of foreign sovereign immunity. Accordingly, this Court should be especially reluctant to construe the "commercial activity" exception in an expansive manner that would subject the internal public acts of a foreign sovereign to the scrutiny of United States courts. *See Kosak v. United States*, 465 U.S. 848 (1984) (refusing to adopt interpretation of FTCA that limited the government's immunity where Congress clearly intended that the governmental activities at issue not be disrupted by the threat of damage suits).

It has long been recognized that governments are extraordinarily sensitive to any inquiry by a foreign court into the propriety of their sovereign acts and that any such adjudication in a United States court has a serious potential to embarrass the executive branch in the conduct

of foreign relations. *See Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."). For this reason, the federal courts have long recognized that any rule of decision that "inhibit[s] the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). For example, until the enactment of the FSIA, federal courts always deferred to the State Department's determination whether a foreign state was entitled to immunity. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). This practice was based on the belief that "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of the judicial proceedings." *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943).[21] Although the FSIA transferred the authority to make immunity determinations to the judiciary, the statute nonetheless was intended "to minimize irritations in foreign relations" arising out of litigation against foreign states, House Hearings at 29 (statement of Monroe Leigh), and "to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts," *id.* at 27.

Adjudicating Respondents' claims against Petitioners in a United States court would starkly implicate these

[21] For similar reasons, this Court has previously invoked the "act of state" doctrine to deny review of claims virtually identical to those of Respondents. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), a United States citizen sued a Venezuelan military officer who had allegedly assaulted, coerced, and detained the plaintiff. *Id.* at 251. The Court held that these were acts of state and "not properly the subject of adjudication in the courts of another government." *Id.* at 254 (citation omitted). More generally, under the "act of state" doctrine, an American court will not declare invalid the official act of a foreign sovereign performed within its own territory. *See W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 492 U.S. 400, 405 (1990).

important foreign policy concerns underlying restrictive foreign sovereign immunity. For example, count IV of the complaint alleges that Article 14 of the United Nation's International Covenant on Civil and Political Rights "establishes internationally accepted legal standards of care for those who stand accused of crimes," and seeks a determination that Saudi Arabia violated those standards "[b]y intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, restraining the Plaintiff against his will, by not providing an interpreter, or speaking to Plaintiff in a language he understood, by either not making the charges clear to him, or not making charges, and by compelling Plaintiff to sign statements which he could not understand." J.A. 7-8. Count V seeks a determination that Saudi Arabia's prison conditions and its treatment of Respondent in prison violated, *inter alia*, the prohibition on "torture . . . or . . . cruel, inhuman or degrading punishment" in Article 5 of the United Nation's International Bill of Human Rights. J.A. 8-9. Count III seeks a finding that Saudi Arabia violated Article 13 of the International Bill of Human Rights by preventing him from leaving Saudi Arabia. J.A. 6-7.

Each of these and the other claims asserted in the complaint would require the trial court to determine a host of politically sensitive issues, such as what motivated the Saudi police who arrested Respondent; whether there was legal cause for his arrest and detention; whether Respondent was physically abused during his interrogation; and whether conditions in Saudi prisons are acceptable. Such an inquiry most likely would require testimony from Saudi Criminal Investigative Division personnel, Saudi prison officials, and other officials of the Saudi government. The court would be asked to adjudge the lawfulness of numerous, particular aspects of the Saudi criminal justice system: Were the prison food and sleeping conditions adequate? Are Saudi Arabia's processes for deciding when and how to bring charges acceptable? Is its method of communicating with detainees who do not speak Arabic consistent with international law?

In short, far from being a dispute about an "ordinary commercial transaction" or the "everyday burdens of the marketplace," House Hearings at 24, 27 (statement of Monroe Leigh) (describing intended scope of jurisdiction under the "commercial activity" exception), this proceeding has the potential to require the most intrusive imaginable inquiry into a foreign state's internal policies and conduct. Saudi Arabia's governmental affairs would be grossly interfered with, and its status as a sovereign state affronted, if a United States court assumed the authority to declare that Saudi Arabia's system of arraignment, interrogation, and imprisonment is unlawful or that Saudi law enforcement officials acted wrongfully in their treatment of Respondent. The restrictive principle of foreign sovereign immunity is designed precisely to avoid judicial interference with such core "political or public acts about which sovereigns have traditionally been quite sensitive," *Victory Transp.*, 336 F.2d at 360, which could seriously impede the executive branch's conduct of relations with foreign states.

Moreover, such an expansive exercise of jurisdiction over a foreign state could have adverse consequences for the reciprocal treatment of the United States in foreign courts, as the United States emphasized in its statement filed in support of rehearing in the Eleventh Circuit:

> The United States has a very substantial interest in the application of the FSIA, which is the only means by which foreign states may be sued in United States courts. Foreign relations depend to a large extent on reciprocal treatment between two states. Thus, if police activities of foreign states are deemed commercial and questioned and punished in United States courts, it is likely that the law enforcement conduct of the United States will also be called into account in foreign courts. And, American law enforcement officials will have to appear in foreign courts to defend their conduct.
>
> Further, if the prevailing law in this country is that foreign police activity can be judged in our courts by our standards, it will be difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities. Even when local foreign law would permit the United States to raise immunity defenses that would not be available under the FSIA, the United States nevertheless uses that statute as a standard for our own claims of immunity in foreign courts. Under this practice, the United States would be foreclosed from asserting immunity for claims in foreign courts involving our law enforcement activity.

J.A. 121-22 (citation omitted).

The assertion of jurisdiction by United States courts over internal Saudi law enforcement affairs also could complicate diplomatic relations in any future dispute in which the United States seeks the release of a United States citizen being detained in a foreign country. The highly sensitive nature of such matters is illustrated by the extensive diplomatic and political activity concerning Respondents' case. Respondent was interviewed by United States embassy officials while imprisoned; he was released following a request made by a United States Senator to the highest levels of the Saudi government; and diplomatic discussions have occurred since that time concerning Respondents' claims. The responsiveness of a foreign state to such political and diplomatic requests for intervention might well be affected if United States courts were free to adjudicate claims against that state challenging the lawfulness of either the particular or general conduct of its criminal justice system.

It is not for this Court or any United States court to weigh these foreign policy considerations in deciding the FSIA jurisdictional issue. Rather, it is precisely because such issues are uniquely outside the competence of the judiciary that courts should be reluctant to reach out to adopt an expansive interpretation of the "commercial activity" exception. It may be within the power of Congress, subject to the constitutional responsibilities of the President, to permit United States courts to hear dis-

putes based on public acts of a foreign state within that state's borders. Until Congress so decides, however, the courts should take special care to limit their exercise of jurisdiction to the types of cases specifically contemplated in light of the FSIA's central purposes. Decades of State Department determinations and judicial decisions on immunity, the legislative history of the "commercial activity" exception, and the plain language and purpose of the FSIA mandate that claims based on foreign state acts of an inherently governmental nature be immune from suit in the United States.

D. Respondents' "Duty To Warn" Negligence Claims Do Not Fall Within The "Commercial Activity" Exception

In addition to alleging many intentional torts, the complaint also alleges that Petitioners breached a duty to warn Respondent of the "hidden dangers of [his] employment," *i.e.*, that he might be wrongfully arrested, imprisoned, and tortured in Saudi Arabia in the course of his employment. J.A. 5, 14. Despite this pleading device, however, the essential acts complained of remain the non-commercial acts of Saudi law enforcement officials within Saudi borders. Because Respondents' "duty to warn" claims require proof of all of the alleged acts and injuries underlying the tort claims, these negligence claims are based upon inherently sovereign law enforcement activity abroad and cannot be adjudicated by a United States court. *See Millen Indus.*, 855 F.2d at 885 (holding that claims involving "mixed" commercial and governmental acts are immune if "the action is based on a sovereign activity").

More generally, if the mere addition of an allegation that a plaintiff should have been warned of the potential for wrongful foreign state conduct were sufficient to convert a claim from one based upon inherently sovereign conduct to one based upon commercial activity, the FSIA's doctrine of restrictive foreign sovereign immunity would be severly undermined. Almost any injury allegedly suffered as a result of a foreign state's governmental

acts could be recast in the form of a failure to warn of that potential injury, at least where the claimant has any sort of commercial relationship with the foreign state. Such an outcome would undercut Congress's manifest effort to ensure that foreign states be immune from any suit challenging their public acts, and would require an unacceptably intrusive inquiry into their internal affairs.

For essentially the same reasons, this Court has rejected similar attempts by plaintiffs to circumvent the government's immunity under the Federal Tort Claims Act (FTCA) by merely pleading a derivative cause of action such as the duty to warn. In *United States v. Shearer*, 473 U.S. 52 (1985), the survivor of Private Shearer, who had been killed by Private Heard off duty and away from base, brought suit under the FTCA, alleging that the Government negligently failed to supervise Heard and to warn other persons of his presence. *See id.* at 53-54. The Court held that the plaintiff's claims were barred under both the FTCA's intentional tort exception, 28 U.S.C. § 2680(h) (1988), and the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). Looking to the language and legislative purpose of Section 2680(h), a plurality of the Court determined that the battery was the "immediate cause of . . . Shearer's death, and, consequently, the basis of [plaintiff's] claim." 473 U.S. at 55. The Court also found that the plaintiff's attempt to "fram[e] her complaint in terms of negligent failure to prevent the assault and battery" could not evade the reach of Section 2680(h) because it "cover[s] claims that sound in negligence, but stem from a battery committed by a Government employee." *Id.* A majority of the court agreed that the plaintiff's claims of negligent supervision and failure to warn were also barred under the *Feres* doctrine because inquiring into "basic choices about the discipline, supervision, and control of a serviceman" would contravene *Feres*' core concern that suits not interfere with military discipline. *Id.* at 58. The plaintiff could not circumvent *Feres* by characterizing her claim as a " 'straight-forward

personnel decision'" because it was the "*type* of claim that . . . would involve the judiciary in sensitive military affairs." *Id.* at 59 (emphasis in original).[22]

In this case, Respondents' efforts to recast their injuries as resulting from a failure to warn cannot alter the fact that the gravamen of their complaint is the alleged wrongful arrest, false imprisonment, and torture. A judicial exploration of such allegations would impermissibly embroil the court in adjudicating the lawfulness of governmental acts in foreign countries. Indeed, Respondents' negligent duty to warn claims would require an even more expansive inquiry into police practices of Saudi Arabia than the intentional tort claims. In order to award Respondents damages on these negligence claims, the trial court presumably would have to determine not only that Respondent was in fact arrested, imprisoned, and tortured without cause, but also that Saudi government officials had previously engaged in a pattern of similar activity such that Petitioners had knowledge of a danger which they had a duty to disclose. The prospect of a United States court summoning a foreign state to trial and not only awarding damages based on the alleged misconduct of police officials with respect to a particular plaintiff, but also issuing a judgment condemning that state's entire system of laws and justice, is manifestly incompatible with the FSIA's restrictive principle of sovereign immunity. For the same reasons that Respondents' intentional tort claims must be dismissed, their negligence claims must be dismissed as well.

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[22] Numerous lower courts have followed *Shearer*'s reasoning that a plaintiff may not plead around immune conduct by alleging a breach of duty to warn or similar negligence. *See, e.g., Persons v. United States*, 925 F.2d 292, 296-97 (9th Cir. 1991). *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 200 (2d Cir. 1987); *Satterfield v. United States*, 788 F.2d 395, 398 (6th Cir. 1986).

II. RESPONDENTS' CLAIMS HAVE INSUFFICIENT CONTACT WITH THE UNITED STATES TO SUPPORT JURISDICTION UNDER SECTION 1605(a)(2)

Part I demonstrates that the FSIA's "commercial activity" exception does not permit a United States court to adjudicate claims involving a foreign state's inherently sovereign acts, irrespective of their alleged relationship to other commercial activity. For that reason alone, the Eleventh Circuit's decision must be reversed, and no further issues need be reached. This Part II further shows that even if Respondents' claims could be said to be "based upon" commercial activity insofar as the complaint alleges that Respondent's mistreatment was related to his job performance, the court of appeals' holding must still be reversed because that commercial activity occurred only in Saudi Arabia and did not have "substantial contact with the United States" as required under Section 1603(e) of the Act. In addition, jurisdiction cannot be exercised over Royspec in any event because the record is devoid of any connection between its commercial activities and Respondents' claims.

A. Respondents' Claims Do Not Have The Required Factual Or Legal Nexus With Petitioners' Activity In The United States

To find the required "substantial contact" between the United States and the alleged wrongful arrest, imprisonment, and other injurious acts in Saudi Arabia, the court of appeals first determined that these acts were "intertwined with [Respondent's] employment at the Hospital." J.A. 113. It then found a sufficient "jurisdictional nexus" with commercial activity carried on in the United States because Respondent's employment in Saudi Arabia was connected to his alleged recruitment and hiring in the United States. J.A. 113. The court reasoned that if Respondent had not been recruited in the United States, he would not have worked in Saudi Arabia, and therefore he would not have been arrested, imprisoned, or allegedly tortured. J.A. 113. By adopting such a "but for" causa-

tion analysis and ignoring the fact that *none* of the alleged acts in the United States has any legal or factual relevance to Respondents' claims, the court of appeals adopted an interpretation of the "commercial activity" exception which is contrary to both the statutory language and the underlying congressional intent, has been uniformerly rejected by the lower courts and is virtually limitless.

Clause One of the "commercial activity" exception limits its jurisdiction to claims based upon foreign state commercial activity which is "carried on in the United States," 28 U.S.C. § 1605(a)(2), *i.e.*, which has "substantial contact with the United States," § 1603(e). This "substantial contact" requirement means that it is not enough that an action against a foreign state is based upon commercial activity or that the foreign state has had some minimal commercial contacts with the United States. Rather, the commercial activity complained of must itself have an important connection to the United States. The FSIA's legislative history specifies that the "substantial contact" requirement "is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." House Report at 17. Furthermore, the "substantial contact" requirement demands more than the due process minimum contacts requirement. *See* House Report at 13; *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988); *Maritime Int'l Nominees Establishment (MINE) v. Republic of Guinea*, 693 F.2d 1094, 1109 n.23 (D.C. Cir.), *cert. denied*, 464 U.S. 815 (1983). The legislative history's examples also confirm that a commercial transaction occurring "in part" in the United States is not "carried on in the United States" unless an essential element of the transaction was performed in the United States.[23]

[23] The examples include "import-export transactions involving sales to, or purchases from, concerns in the United States" and "indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States." House Report at 17.

In applying this "substantial contact" standard, the lower courts have articulated various tests concerning the necessary connection or "nexus" between the United States and the foreign state commercial activity on which the action is based. Some courts have ruled that the "substantial contact" requirement is satisfied only if the plaintiff can demonstrate "a direct causal connection" between the commercial activity in the United States and the acts forming the basis of the complaint, or if the commercial activity in the United States " 'is an element of the cause of action under whatever law governs [the] claims.' " *Zedan*, 849 F.2d at 1514 (quoting *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982)). Most courts have simply stated that Clause One of Section 1605(a)(2) requires a "jurisdictional nexus" between the foreign state's commercial activity in the United States and the commercial activity abroad at issue in the case, which means both that "the commercial activity that provides the jurisdictional nexus [must] also be the activity on which the lawsuit is based," *Stena Rederi v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991), and that there must be a substantial connection between the commercial acts in dispute and the United States. *See, e.g., Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991) (requiring a "material" connection), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956).

Although Petitioners believe that the *Zedan* formulation of the test is the most consistent with the statutory language and the underlying congressional intent, the critical point is that it is clear under any formulation that the "carried on in the United States" requirement refers to significant activity, of legal and factual relevance to the cause of action, that has occurred in the United States. Contrary to the Eleventh Circuit's decision, a mere "but for" relationship between commercial

activity in the United States and the commercial activity abroad forming the basis of the claim is not sufficient to create jurisdiction under Clause One. *See, e.g., Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 894 (7th Cir. 1991) (where plaintiff sued Air France for personal injuries resulting from the negligence of an Air France employee at a French airport, claiming that his cause of action was based upon Air France's commercial activity in the United States because he would not have been working at the airport "but for" a lease between his United States employer and Air France requiring the employer to provide maintenance workers at the airport, court of appeals held that the plaintiff could not satisfy the "substantial contact" requirement because "[n]one of the elements of [his] claim concern acts in the United States"); *Zedan*, 849 F.2d at 1514 (rejecting plaintiff's theory under which "jurisdiction would extend to any and all disputes between Zedan and Saudi Arabia subsequent to the [recruitment] phone call, merely because but for that call Zedan would not have traveled to Saudi Arabia").

Thus, regardless of the particular formulation of the "substantial contact" nexus requirement, the court of appeals' holding must be reversed. With respect to the intentional tort claims, Respondent's own allegations are that he was injured *wholly in Saudi Arabia*, as a result of arrest, imprisonment and torture *wholly in Saudi Arabia*, for reporting an unsafe condition at a hospital at which he was employed *wholly in Saudi Arabia*. Even a cursory review of the allegations of the complaint shows that these intentional tort claims require no proof of *any* activity in the United States. For example, the Unlawful Detainment count alleges that Saudi Arabia violated international law by "prohibiting [Respondent] from exiting the country, as was his legal right." J.A. 7. No act in the United States has any legal or factual significance to this cause of action. Similarly, Respondent's Wrongful Arrest and Imprisonment count—which alleges that Saudi Arabia violated his rights under international law to be informed of the charges against him, to have time to prepare a defense, to consult with counsel, to have access to an interpreter, and not to be compelled to testify against himself, J.A. 7-8—has no factual or legal relevance to any activity that is said to have occurred in the United States. The same is true of the other intentional tort claims in the complaint.

In short, even if Respondent's tort claims could be said to be based upon commercial activity, that activity was his job performance in Saudi Arabia. Events occurring before he started work in Saudi Arabia in December 1983 are literally irrelevant to these claims. The mere fact that Petitioners performed some commercial acts in the United States does not suffice to create jurisdiction. The alleged recruitment of Respondent in the United States through placement of a magazine advertisement is irrelevant to his intentional tort claims because Respondent does not contend that HCA recruited him for the purpose of enticing him to Saudi Arabia for imprisonment and torture. Nor does Respondent's act of signing the employment contract in the United States have anything to do with the intentional tort claims. Indeed, Respondent concedes that his claims are *not* based upon "disputes relating to the contract." R. 29, 7. Because none of the alleged acts in the United States is legally or factually relevant, the intentional tort claims do not have "substantial contact" with the United States.[24]

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[24] The lower courts have reached the same result in analogous cases. *See, e.g., America West*, 877 F.2d at 797 (Clause One did not confer jurisdiction over negligence claim for faulty maintenance of aircraft engine in Ireland by subsidiary of state-owned airline where that entity performed no aircraft maintenance in the United States); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1360 (9th Cir. 1988) (Clause One's jurisdictional nexus requirement not satisfied where only connection between wrongful death action involving crash in Mexico or state-owned airplane and the United States was servicing of the plane in the United States the day before the accident); *Vencedora Oceania Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 203-04 (5th Cir. 1984) (holding that Clause One does not confer jurisdiction over conversion claim based on state-owned corporation's decision to tow plaintiff's vessel to Algerian

Similarly, Respondents' duty to warn claims also are not based upon commercial activity "having substantial contact with the United States." Although Respondents have suggested that these claims have a nexus with the United States because Petitioners could have warned him in the United States prior to his commencement of employment,[25] this argument ignores the fact that the overwhelmingly logical place for any such warning to have occurred was Saudi Arabia. Even if Petitioners had a duty to warn Respondent of the alleged "hidden dangers" of employment in Saudi Arabia, they certainly had no duty to disclose those dangers to him in the United States before he commenced employment.[26] Disclosure of these alleged dangers to Respondent at any time after he commenced work in Saudi Arabia and before he reported the alleged safety violation at KFSH would have precluded the negligence claims. The relevant "omission," therefore, would be the failure to disclose this "danger" during the nine-month period preceding Respondent's arrest while he was

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port, where corporation's business in the United States was unrelated to the towing operation).

[25] An additional reason to dismiss Respondents' duty to warn claims is that the only alleged acts taken in the United States were the acts of HCA, not Petitioners. The contacts of an agent of a foreign state with the United States should not be attributable to the foreign state for jurisdictional purposes under the FSIA. *See e.g., Compania Mexicana de Aviacion*, 859 F.2d at 1360 (holding that the servicing of an airplane by a United States company in the United States for a state-owned airline was an insufficient contact to support jurisdiction under Clause Two of § 1605(a)(2) over tort claims arising from crash of that airline in Mexico); *Barnett v. Iberia Airlines*, 660 F. Supp. 1148, 1152 (N.D. Ill. 1987) (holding that under Clause One, the sale of an airline ticket to plaintiff by a United States company, acting as agent for a state-owned airline, does not establish the requisite "nexus" between the United States and the commercial activity of the state-owned airline abroad forming basis of tort claim).

[26] Under the terms of Respondent's employment contract, J.A. 40, and as Respondents admit, J.A. 4, Respondent's employment with the Hospital did not begin until he returned to Saudi Arabia in December 1983.

living and working in Saudi Arabia. The mere fact that Respondent theoretically could have been "warned" in the United States prior to commencing employment does not alter the fact that the essential locus of the omission was in Saudi Arabia.[27] *Cf. Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (Scalia, J.) (holding that foreign state's conduct in the United States related to plaintiff's tort claim was not "in and of itself tortious" and that because the gravamen of the tort claim was a failure to compensate for the taking of property, the "omission . . . must be deemed to occur in" the foreign state), *cert. denied*, 470 U.S. 1051 (1985). Moreover, even the critical events relating to the formation of the employment contract—the interview and the offer—occurred in Saudi Arabia as well. Because Saudi Arabia is where a warning, if any, logically should have occurred, Respondent's negligence claims lack the required "substantial contact" with the isolated activities in the United States.

B. Even If Arguably Relevant To Respondents' Claims, The Activities Of Saudi Arabia And KFSH Did Not Have "Substantial Contact" With The United States

Irrespective of their legal or factual relevance to Respondents' claims, Saudi Arabia's and KFSH's activity in the United States was not substantial enough to create jurisdiction under the "commercial activity" exception. In construing the "substantial contact" requirement, the lower courts have consistently held that where the essential elements of the commercial activity in dispute occurred

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[27] Courts are often called upon to determine the locus of an omission for purposes of the FTCA, which requires application of "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b) (1988). *See Richards v. United States*, 369 U.S. 1, 10 (1962). Because an omission by definition is an act which failed to occur, a negligent omission cannot actually "occur" anywhere. *See Ducey v. United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983). Nevertheless, in determining which forum's substantive law to apply under the FTCA, courts have held that the "locus" of an omission should be considered to be the "place where the act necessary to avoid the negligence should have occurred." *Id.*

ouside the United States, incidental contacts that are part of a series of events related to the disputed commercial conduct are not "substantial." For example, in *MINE*, 693 F.2d at 1109, the court held that the contacts by the Republic of Guinea—two business meetings related to a breach-of-contract claim—were nothing more than "transitory" and "insubstantial" for purposes of the Act, especially given "their uncertain scope and importance." *See also Gerding*, 943 F.2d at 527 (in case involving wrongful death action, meetings in United States did not constitute "substantial contact" for purposes of "commercial activity" exception); *Zedan*, 849 F.2d at 1513 (in breach-of-contract action in which both the performance of the employment contract and its alleged breach occurred in Saudi Arabia, recruitment call to the United States—which seemed "analogous to the placement of an advertisement in a local California newspaper inviting job applicants to go to Saudi Arabia"—did not satisfy the "substantial contact" requirement).

Similarly, in this case HCA's advertisement of the position at the Hospital and the "fortuitous happenstance" that Respondent signed his contract while in the United States, J.A. 95, do not constitute "substantial contact" with the United States. Indeed, these limited contacts would not provide even the "minimum contacts" necessary under the due process clause for personal jurisdiction.[28] To the extent that the formation of Respondent's contract is in any sense relevant to the case, which Petitioners deny, the critical events—the job interviews and offer—occurred in Saudi Arabia. Permitting jurisdiction in these circumstances would be tantamount to holding, contrary to the specific intent reflected in the legislative history, that jurisdiction may be "occasioned simply by the U.S. citizenship . . . of" Respondent. House Report at 17. The total amount of activity of Saudi Arabia and KFSH in

[28] *See Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418 (11th Cir. 1986) (recruitment by out-of-state defendant in the forum state insufficient to satisfy minimum contacts requirements for personal jurisdiction).

the United States with respect to Respondent was not "substantial" under 28 U.S.C. § 1603(e), and therefore jurisdiction must be denied.

C. Royspec Cannot Be Subjected To Jurisdiction Under The "Commercial Activity" Exception Because It Is A Veritable Stranger To Respondents' Claims

The arguments set forth in Part I.B. demonstrate that jurisdiction cannot be exercised over any of the three Petitioners in this case. An additional ground for dismissing the suit against Royspec is that Royspec simply had no involvement whatsoever in any of the events involving Respondents. The court of appeals found a "jurisdictional nexus" between Royspec's commercial activity in the United States and Respondents' claims based solely on Respondent's receipt of the telephone number of Royspec's Maryland office for contacting his family in the event of an emergency, and Respondent's unsupported allegation that the telex designation "ROSPEC," appearing on four telegrams in which Respondent's employment is discussed, "may be" the designation for Royspec. J.A. 114. This holding is erroneous because, as the district court found, uncontradicted record evidence demonstrates that Royspec had absolutely no involvement in Respondent's alleged recruitment or hiring in the United States.

Because Royspec is a separate entity, it is entitled to a "presumption of independent status" and cannot be sued for the acts of other governmental entities absent a factual basis for overcoming this presumption. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). Respondents produced no evidence to overcome the presumption that the acts of HCA, Saudi Arabia, or KFSH cannot be attributed to Royspec. Therefore, jurisdiction can be asserted over Royspec only if its *own* acts in the United States provide the necessary "substantial contact" with the acts on which Respondents' claims are based.

Although Royspec, as the Hospital's purchasing agent, engaged in commercial activity in the United States, un-

controverted affidavits in the record confirm that Royspec did not participate in any manner whatsoever in the recruitment of Respondent. J.A. 23-24, 30, 31. That role was performed, exclusively by HCA, as *required* by the terms of the contract between HCA and the Hospital. J.A. 72-74. The mere fact that Royspec was identified as a United States contact for families of KFSH employees in case of emergencies cannot suffice, under any conceivable test, to constitute a "substantial contact" with the activities on which Respondents' claims are based.[29]

Respondent also argued below that a reference to "201050 ROSPEC SJ" on Hospital documents, and in correspondence between the Hospital and HCA concerning his employment, referred to "ROSPEC" and therefore showed that Royspec was involved in his recruitment. In response, Royspec submitted an uncontroverted affidavit confirming that the word "ROSPEC" on certain documents was a telex designation in Saudi Arabia and not a reference to Royspec.[33] Without explanation, the court of appeals chose to ignore this undisputed evidence in favor of Respondents' mere suspicion:

> We also note that four telegrams, all of which acknowledge [Respondent's] employment, contained the telex designation "ROSPEC," which, according to Nelson, may be the designation for Royspec. Although Saudi Arabia denies that the desgnation "ROSPEC" represents Royspec, on the record before the court and under the FSIA, we conclude that Royspec is within the subject matter jurisdiction of the court. J.A. 114.

However, Respondents' speculation about Royspec's involvement is entitled to no weight, and Royspec's uncon-

[29] As Royspec demonstated in the district court, "201050 ROYSPEC SJ" is the telex number for the Hospital in Saudi Arabia. It follows the word "telex" on the bottom of Hospital letterhead and is not even spelled the same as "Royspec." J.A. 29-30, 32. These references instead establish that the Hospital and HCA were communicating with each other directly through telexes to Saudi Arabia and *did not* use Royspec as an intermediary.

troverted affidavits were required to be taken as true. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1239 (6th Cir.) (giving conclusive weight to "uncontroverted affidavits" of defendant on 12(b)(2) motion), *cert. denied*, 454 U.S. 893 (1981). The district court's resolution of this factual dispute in Royspec's favor cannot be set aside because the record does not show that it was clearly erroneous. The court of appeals' holding with respect to Royspec should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and Respondents' actions should be dismissed.

Respectfully submitted,

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APPENDIX

1. Section 1603(d) of the Foreign Sovereign Immunities Act provides:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

2. Section 1603(e) of the Foreign Sovereign Immunities Act provides:

> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. Section 1605(a)(2) of the Foreign Sovereign Immunities Act provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

4. Section 1605(a)(5) of the Foreign Sovereign Immunities Act provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> * * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights

* * * *

No. 91-833

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether claims of false imprisonment, battery, negligence and derivative injury—founded directly upon the recruitment and employment practices and the wrongful disciplinary actions of a hospital enterprise and its foreign state owner—are "based upon" activities of a "commercial" nature for purposes of establishing U.S. jurisdiction under the Foreign Sovereign Immunities Act.

2. Whether the activities of a hospital employer in staffing its overseas facility through extensive recruitment and hiring in the United States, transacting in the United States for the services of a United States citizen, and wrongfully retaliating against him for performing those services, are activities having "substantial contact with the United States" for purposes of establishing U.S. jurisdiction under the Foreign Sovereign Immunities Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON and VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

Respondents Scott Nelson and Vivian Nelson (plaintiff-appellants below) request that this Court affirm the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions below are adequately set forth in the Brief for the Petitioners.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioners.

STATUTES INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act"), 28 U.S.C. § 1602 *et seq.* Pertinent provisions of the FSIA are set forth in the attached Statutory Appendix.

STATEMENT OF THE CASE

Introduction. The King Faisal Specialist Hospital and Research Center, its agent Royspec Purchasing Services, and its owner, the Kingdom of Saudi Arabia, (defendant-appellees below) seek to reverse an appeals court decision that the federal courts are competent, under the Foreign Sovereign Immunities Act, to adjudicate the Nelsons' claims against them. Those claims, for personal injury, arise out of the Hospital's commercial dealings in the United States and related activities in Saudi Arabia. In particular, they are based upon the Hospital's employment practices —*i.e.*, its recruitment and engagement of Scott Nelson in the United States to assume certain responsibilities as a systems engineer at the Hospital's facility in Riyadh, and the wrongful "disciplinary" actions taken against him by the Hospital for performance of those responsibilities. In retaliation for Mr. Nelson's persistent efforts in accordance with his job responsibilities to correct a serious health and safety hazard in the Hospital's mechanical systems, the Hospital wrongly caused him to be imprisoned, detained under inhumane conditions, and tortured. The issue is whether the court of appeals correctly held that the Nelsons' suit is based upon commercial activity having substantial contact with the United States, thereby putting the matter within the jurisdiction of our courts under clause 1 of section 1605(a)(2) of the FSIA.

The Parties. Respondent Scott J. Nelson ("Nelson") was born on April 5, 1954 in Boston, Massachusetts and is a citizen of the United States. Respondent Vivian Nelson, his spouse, is also a U.S. citizen. Petitioners are the King Faisal Specialist Hospital and Research Center (the "Hospital"), Royspec Purchasing Services ("Royspec"), and the Kingdom of Saudi Arabia. The Hospital is a health care enterprise that provides a variety of medical services. It has medical, administrative, housing and other facilities in Riyadh. Royspec serves as an agent of the Hospital in the United States for

purchasing and other purposes. It maintains an office in Harmans, Maryland. The Kingdom of Saudi Arabia ("Saudi Arabia" or "Owner") owns and controls both the Hospital and Royspec. It is not disputed that Saudi Arabia is a "foreign state" and that the Hospital and Royspec are an "agency or instrumentality of a foreign state" as defined in the FSIA. 28 U.S.C. § 1603(a), (b).

The Jurisdictional Facts.[1] In August 1973, while the Hospital was still under construction, Saudi Arabia and the Hospital entered into a multi-million dollar contract with the Hospital Corporation of America ("HCA"), a Tennessee corporation that operates numerous for-profit hospitals in the United States. (Joint Appendix [hereinafter "J.A."] 70-84) Under the contract, HCA agreed to "act for" Saudi Arabia as "Owner" in "assum[ing] complete management responsibility for operations of the Hospital." (J.A. 72) This included, among many other matters, "overall responsibility" for recruiting the staff "required to open and operate the Hospital." (*Id.*) In particular, HCA "as agent" undertook to "recruit and employ administrative, nursing, technical, maintenance and all other personnel." (J.A. 72-73) The agreement contemplated recruitment activities by HCA "worldwide," including in the United States, to engage "expatriate personnel" on behalf of Saudi Arabia and the Hospital. (J.A. 72, 82)

Under the contract, Owner asserted its "ultimate authority for the operation of the Hospital." (J.A. 76) The contract specifically required that Owner "approve" HCA's

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[1] This case involves a facial challenge to subject matter jurisdiction. As they did in the district court and the court of appeals, Petitioners invite this Court to entertain certain factual issues in sharp dispute between the parties. These issues were properly disregarded by both the courts below. *See infra* at 11-13. To facilitate the Court's consideration of the jurisdictional issues, Respondents confine their discussion of these disputed facts to the footnotes.

"standard form employment contract * * * in order to assure that such contract adequately sets forth the conditions of employment of the Hospital deemed necessary by Owner." (J.A. 72) According to the contract, "[a]ll such employment contracts will be between Owner and the employee, but may be executed for Owner by HCA." (*Id.*) The contract also provided that Owner shall "select the candidates to be employed and shall set their salary and other remuneration." (J.A. 73)

The initial term of the contract was seven years, through August 31, 1980, and Saudi Arabia, the Hospital and HCA amended and extended the contract periodically. (J.A. 76, 85-89) In 1979, Royspec assumed responsibility for purchasing functions in the United States previously handled for the Hospital by HCA. Under contract with the Hospital, however, HCA continued to have "exclusive responsibility for recruiting" all expatriate personnel from the United States through at least 1989. (J.A. 23, 30)

In 1983, as part of this ongoing recruitment program carried on in the United States, HCA announced an opening in the Hospital's engineering/utilities maintenance department for a "monitoring systems engineer." (J.A. 13, 17, 25) Its advertisement in the September 8, 1983 issue of *Engineering News-Record* described a "passport to international opportunities" with the Hospital, at a "beautifully landscaped medical city located in the heart of the Kingdom."[2] The advertisement stated, "Persons interested in this position will be employed by, have a contract with, and work directly for the Government of the Kingdom of Saudi Arabia." "For further information and/or to apply" for the job, such persons were directed to contact HCA in Nashville, Tennessee. (J.A. 25)

[2] *Engineering News-Record* is published by McGraw-Hill Publications Co. in New York City. In 1983, it had a weekly circulation of 106,000 copies. *See* ULRICH'S INT'L PERIODICALS DIRECTORY 529 (22d ed. 1983).

While in the United States, Nelson saw the advertisement. Subsequently, he interviewed for the job in Saudi Arabia. Following the interview, on October 23, 1983, the Hospital (or Royspec on its behalf) telexed HCA in Nashville to notify it of the Hospital's approval for HCA to hire Nelson. For purposes of follow-up by HCA, the message also confirmed Nelson's Florida address and the date of his return to the United States. (J.A. 28) During November 1983, HCA recruited him to fill the position. (J.A. 4)

On November 29, 1983, in Miami, Nelson signed a two-year employment agreement with the Hospital. (J.A. 4, 13, 17, 40-47) The agreement likewise was signed in the United States by an official of HCA "as agent," acting in accordance with its contract on the Owner's and the Hospital's behalf. (J.A. 47) Under the agreement, Nelson accepted the job of monitoring systems engineer. (J.A. 40) The Hospital defined his "principal duties" to include maintaining Hospital systems in "compliance with safety regulations," "[t]roubleshoot[ing] problems and implement[ing] corrective action." (J.A. 26-27) His assigned function was "to inspect and monitor all hospital facilities, equipment, utilities, and maintenance systems to insure the safety of patients, hospital staff and others." (J.A. 4, 13, 17) Prior to his departure for Saudi Arabia on December 7, 1983,[3] Nelson completed various application, processing and medical screening requirements in the United States and travelled to Nashville for a Hospital employee "orientation" program. (J.A. 13, 33, 57) At this program, HCA identified Royspec in Maryland as the U.S. point of contact for family members that might wish to contact the Nelson family in Saudi Arabia in the event of any emergency. (J.A. 33, 96)

[3] The contract required that Nelson surrender his and his family's passports to the Hospital for the duration of their stay in Saudi Arabia. It also stated that this would "not in any way restrict [Nelson's] ability to obtain the passport whenever it is deemed necessary." (J.A. 41-42, 46)

During the ninety-day probationary period specified in the contract and thereafter, Nelson performed his duties at the Hospital "without incident."[4] (Brief for Petitioners [hereinafter "Pet. Br."] at 4) On or about March 20, 1984, in the course of his work, he identified certain "safety hazards" at the Hospital. (J.A. 4, 13, 18) These hazards were posed by "grease valve[s]" (as opposed to sterilized valves) "in the oxygen and nitrous oxide lines at the * * * Hospital." (J.A. 52, 102) "These [valves] were not only a fire hazard, but were endangering patients [sic] lives in that all lines that connected to these valves were contaminated."[5] (J.A. 57) During the period from March 20 through August 1984, Nelson "repeatedly reported" these "safety hazards" to hospital officials. (J.A. 4-5, 13, 18) Rather than authorizing Nelson to take appropriate corrective measures, Hospital officials repeatedly instructed him to ignore the problem. (J.A. 58) In due course, Nelson also reported his discovery to a Saudi Royal Commission that was investigating the Hospital. (J.A. 4-5, 13, 18, 58)

In the face of continuing harassment from Hospital authorities, Nelson offered and requested to resign his position and depart Saudi Arabia in June and September 1984. (J.A. 58) The Hospital, however, declined to

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[4] His job performance merited a June 13, 1984 "Letter of Appreciation" from his supervisor who noted Nelson's "ability to successfully and efficiently carry out * * * job * * * functions" as well as his "devotion, professionalism and concern" for the Hospital. (Pls.' Ex. 5, R. 29) Subsequently, Nelson's supervisor recommended that Nelson be promoted, stating that his "experience and knowledge * * * would be most difficult to replace." (Pls.' Ex. 6, R. 29)

[5] At approximately the time Nelson discovered this situation, the Hospital staff had apparently identified an unusual incidence of "problems with patients expiring due to respiratory failures for simple-type procedures." Relating these problems to the contaminants introduced in the lines by the grease valves, Nelson naturally had concerns about his professional and personal accountability should the situation not be corrected. (J.A. 63)

accept his resignation, thereby requiring Nelson to remain in Saudi Arabia against his will. (J.A. 5, 58) On September 27, 1984, as a "direct and proximate result of these actions" in bringing to light these safety hazards, employees of the Hospital summoned Nelson to the Hospital's security office, from which he was taken to a cell in a detention facility. (J.A. 5, 14, 18, 58) There, persons "acting at the direction, instigation, provocation, instruction or request" of the Hospital, Royspec (its agent), and/or Saudi Arabia (its Owner) proceeded to "shackle[], torture[] and beat[]" Nelson. (J.A. 5, 14, 18, 58-59) So serious were Nelson's injuries that from the date they were first inflicted, the first date of his detention, he has been adjudged to be permanently and totally disabled.[6]

For the next four days, Nelson was kept in solitary confinement in a small cell and deprived of food. On October 1, Nelson was taken to an office where he was met by an interpreter whom he recognized to be a Hospital employee. This employee instructed Nelson to "sign anything they ask" and warned him that otherwise the beatings would continue. Nelson signed an Arabic language statement, the nature of which was and still is unknown to him. Two days later, on October 3, Nelson was transferred to a Saudi prison.[7] (J.A. 59-60)

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[6] Respondents have lodged with the Court a copy of the decision rendered by Administrative Law Judge David D. Tennant, following an evidentiary hearing on Nelson's application to the Social Security Administration for disability insurance benefits. The case concerned his claim of inability to work "because of the residual effects of being tortured while held as a prisoner in Saudi Arabia." The decision upheld Nelson's claim for disability as of September 27, 1984. *See In the Case of Scott J. Nelson*, No. 015-42-6023 (Dep't of Health and Human Services, Office of Hearings and Appeals, Sept. 14, 1990).

[7] From October 3 onward, Nelson was held in a large overcrowded cell. He was forced to sleep on the floor of the cell where rats crawled over him throughout the night. The lights glared twenty-four hours a day. Meals were served on a single large tray and, as prisoners grabbed the food directly from the tray with their hands,

During the first several days of his confinement, Nelson was held incommunicado and his family was not informed of his whereabouts. After Mrs. Nelson finally was advised of her husband's situation, a Saudi official made a suggestion to her that he could arrange for her husband's release in exchange for "sexual favors." (J.A. 5, 56)

On November 5, 1984, Nelson finally was released from prison. (J.A. 5, 60) During his 39 days of detention, no Hospital or Saudi government official ever advised him or Mrs. Nelson of the reasons he was taken and held, nor was Nelson charged with any offense. (J.A. 5, 56, 60) He was not brought before any committing magistrate, examining court or similar authority, nor was he made the subject of a preliminary hearing or any other ostensible legal process. (*Id.*) After Nelson's release, officials of the Hospital in fact urged him to resume his duties and, by withholding passports and exit visas, required Nelson and his family to remain in Saudi Arabia for seven more days, in the hope he would choose to do so. (J.A. 60-61) On November 12, 1984, Nelson and his family at last were allowed to leave the country. (J.A. 5, 61) Returning to Florida "to seek medical help," Nelson began a course of surgery and intensive physical therapy. (J.A. 61)

Petitioners concede, as they must, that the allegations in the complaint are to be taken as true for purposes of their "facial challenge to jurisdiction." (Pet. Br. at 3 n.3) They nonetheless deny that the complaint and other materials of record (which principally consist of exhibits to Petitioners' own motion papers in the district court) are "accurate or complete" with respect to the circumstances of Nelson's detention. (*Id.*) In particular, "Saudi Arabia has consistently maintained that Respondent was

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Nelson felt fortunate for the times he was able to secure a handful for himself. He was allowed outside the cell only once a week for fresh air and exercise. Prisoners due to be lashed were removed from the cell area daily and beaten so that all could watch. (J.A. 59-60)

arrested because of his misrepresentations and forgery." (Pet. Br. at 4-5) Nelson acknowledges, as he has done since 1984, that after completing his employment application, he misrepresented to HCA that he received a college degree. (J.A. 35-39) Petitioners have produced nothing, however, to support their claim that these acts did or could provide the occasion for Nelson's detention.[8] The record does not support their claim,[9] and in fact

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[8] Petitioners have produced not a shred of documentary or other evidence reflecting Saudi law enforcement or judicial procedures directed against Nelson whether relating to an official investigation or to an arrest, interrogation, detention, arraignment, conviction, punishment or discharge. Almost eight years after Nelson's detention, Petitioners' U.S. counsel now cite provisions of a ministerial resolution and royal decree, and would have the Court infer that these provisions criminalize the conduct to which Nelson has admitted—i.e., misrepresenting his educational credentials to HCA in the United States. (Pet. Br. at 5 n.6) Petitioners' U.S. counsel do not state that Nelson was arrested, held or charged under these provisions.

[9] The material in the record on which Petitioners do rely has no evidentiary value. It consists of one sentence in a two-paragraph State Department "report" which states, "On September 24, 1984, [sic] Nelson was arrested for having presented Saudi officials with a fraudulent college degree * * *." (J.A. 64) Submitted in response to a question at a 1987 Congressional hearing, the "report" sought to explain why the Department had not protested the maltreatment of Nelson and three other U.S. citizens. (J.A. 51, 63-65) Oral testimony offered by John Adams, the Director of the State Department's Citizens Emergency Center, corroborates Nelson's account (and flatly contradicts the "report"). Asked whether, having "studied these cases," he doubted the "veracity" of Nelson or the other witnesses, Mr. Adams replied "for the record": "No, there is no doubt in my mind * * * I don't challenge their veracity, no." (J.A. 66; *see also* J.A. 65-66 (testimony of Marion V. Creekmore, Deputy Assistant Secretary, Bureau of Near Eastern and South Asian Affairs, Department of State))

Asked during this same hearing whether he had been charged with any crime in Saudi Arabia, Nelson affirmed that there was "never any charge of wrongdoing" or accusation of a "crime of any kind" made against him. (J.A. 62) Petitioners suggest that these replies were untruthful. (Pet. Br. at 6 n.8) Nonetheless, in eight years they have produced nothing to substantiate their claim that any criminal charge or accusation in fact was made against him.

contains numerous indications to the contrary.[10] Petitioners, in any event, do not suggest that these actions might explain or justify the battery and severe physical injuries of which Nelson complains. (J.A. 15-16)

The Complaint. In 1988, Respondents brought this action for damages in federal court. Their complaint names the Hospital and Royspec, each of which is alleged to be "a separate legal person and an agent, instrumentality and alter ego of * * * Saudia Arabia." (J.A. 13, 17) It also names Saudi Arabia directly, as a "foreign state which does maintain and run the * * * Hospital * * * and which conducts through * * * Royspec (and other agents), business activities in the United States" for the Hospital. (J.A. 4)

The complaint states sixteen causes of action or "Counts," including "tortious acts or omissions and willful and overt violations of international law." (J.A. 11) The core of the complaint, Counts IX through XII, concerns torts by the Hospital. Count IX ("negligence") alleges breach by the Hospital (as Nelson's "recruiter and/or employer") of its duty to exercise due care to prevent Nelson's injury. It asserts, in particular, that at the time the Hospital recruited Nelson, at the time he began work, and at the time he reported the safety hazards, the Hospital breached a duty to warn and in-

[10] The internal "Note" authored by the Hospital's Legal Advisor, cited by Petitioners (Pet. Br. at 4 n.5) and made part of the record below, states that HCA and the Hospital had reason to know about the diploma prior to July 12, 1984—two and a half months before Nelson was first detained. The "Note" states that if Nelson were unable to rebut this accusation, the Hospital should terminate Nelson's employment in accordance with the "Disciplinary Procedures" specified in his contract. (J.A. 43-44) While the Legal Advisor's "Note" suggests no possibility of, or even any grounds for, Nelson's arrest or prosecution, it does allude to the "information" provided by Nelson to the Royal Commission and the "conflict which is being settled by the Royal Commission, which is specially formed to investigate the Hospital's conditions * * *." (Pls.' Ex. 4, R. 29)

struct him of dangers associated with his employment. In this Count, the complaint charges, *inter alia*, that the Hospital "knew or should have known that officials of the Saudi Government, and officials of Saudi institutions such as [the Hospital], have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause." It also asserts that the Hospital "knew or should have known" that Nelson risked "severe retaliatory action" in the event he sought to remedy or disclose health-related or other hazards at the Hospital. Count X ("battery") states that the Hospital, acting "by and through its agents or employees," intentionally and unlawfully struck and assaulted Nelson. Count XI ("false imprisonment") recites in similar terms that the Hospital deprived Nelson of "his liberty without * * * legal justification." In Count XII ("derivative claim"), Mrs. Nelson asserts loss of support and other injuries as a result of the Hospital's "tortious acts or omissions."

Counts XIII through XVI of the complaint restate the foregoing allegations in virtually identical terms against Royspec.

The remaining eight counts of the complaint concern Saudi Arabia. Counts I ("negligence"), II ("battery") and VIII ("derivative claim") restate as to Saudi Arabia the allegations elsewhere made against the Hospital and Royspec. Finally, Counts III ("unlawful detainment"), IV ("wrongful arrest and imprisonment"), V ("inhuman torture"), VI ("disruption of normal family life"), and VII ("mental anguish") allege the breach by Saudi Arabia of numerous provisions of international law.

The Opinion of the District Court. On August 11, 1989, the United States District Court for the Southern District of Florida dismissed Respondents' complaint for lack of subject matter jurisdiction under the FSIA. (J.A. 91-98) Because Respondents' motion to dismiss was a facial challenge to jurisdiction, the court held no evidentiary hearing and did not purport to resolve any

factual issues related to the asserted basis of jurisdiction.[11] It held that clause 1 of the commercial activities exception of the FSIA—providing jurisdiction "in any case in which the action is based upon a commercial activity" of a foreign state that has "substantial contact with the United States"—did not apply to the complaint against the Hospital and Saudia Arabia for two reasons. (J.A. 93) The court held that neither the recruitment activities by the Hospital and Saudi Arabia in the United States nor the execution of an employment contract with Nelson in the United States would "qualify as substantial contact." (J.A. 95) The court also held that even if the commercial activities of the Hospital and Saudi Arabia did have substantial contact with the United States, the "nexus" between the causes of action alleged and those commercial activities was "too tenuous to support jurisdiction over a foreign sovereign." (J.A. 96-97) Similarly, with respect to the claims against Royspec, the court found that, although Royspec "carries on commercial activities in this country," there was "no nexus between Royspec's business and the torts alleged" in the complaint. (J.A. 94, 96)

The Decision of the Court of Appeals. The United States Court of Appeals for the Eleventh Circuit unanimously reversed the decision of the district court. It held that clause 1 of the commercial activities exception confers subject matter jurisdiction under the FSIA. (J.A.

[11] In their Memorandum In Support Of The Motion To Dismiss The Complaint, the Hospital and Saudi Arabia observed that "[a]n inquiry into the underlying acts and motivations of the Saudi police, however, need not and should not be undertaken by this court. The complaint can and should be dismissed in its entirety even if the court assumes that the plaintiffs' allegations are true." (R. 71) While Petitioners nonetheless pressed their claim that Nelson was detained following the government's discovery that he had misrepresented his credentials, rather than in retaliation for reporting safety violations, the district court found that "those disputed facts are not relevant to the motions to dismiss." (J.A. 92 n.1)

101) Accepting the allegations in the complaint as true for purposes of resolving the appeal, including the allegation that the three Petitioners are alter egos of one another, the Eleventh Circuit drew no distinctions among the Hospital, its agent and its owner, but referred to Petitioners "collectively" as "Saudi Arabia." (J.A. 100)

In reaching its decision, the appeals court first concluded that "[o]n the facts presented * * * the recruitment and hiring [of Nelson] in the United States constituted a 'commercial actvity' " that the Petitioners had carried on here. (J.A. 109). The court further found that their retaliatory actions against Nelson[12] "resulted from and were directly attributable to [his] employment," the duties of which included "detecting and reporting safety violations at the Hospital." (J.A. 113) Accordingly, the court concluded that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." (*Id.*)

Following the decision of the court of appeals, Petitioners requested rehearing and suggested rehearing *en banc*. In a decision dated July 1, 1991, the Eleventh Circuit denied this request. (J.A. 133) This Court granted the petition for certiorari on June 8, 1992.

[12] Petitioners likewise argued in the court of appeals that "the actions taken against Nelson were the result of Nelson's submission of a false diploma * * *." (J.A. 114) Without seeking to resolve the question, the court observed that "this argument * * * in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction." (*Id.*)

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that the FSIA confers jurisdiction over Scott and Vivian Nelson's suit for intentional torts, negligence and derivative injury against the Hospital, its agent Royspec, and their owner Saudi Arabia.

Because the Nelsons complain of the commercial activities of a hospital enterprise that have substantial contact with the United States, their action is one properly subject to United States jurisdiction under clause 1 of section 1605(a)(2) of the FSIA. Under that clause, the FSIA directs that a foreign state shall not be immune in any case in which the action is based upon a particular act or transaction or a regular course of conduct carried on by such state, provided it is "commercial" in nature and has "substantial contact" with the United States.

Here, the Nelsons base their claims on inherently commercial activities of a hospital enterprise that have abundant contacts with the United States. Their action is based on the recruitment and employment of Hospital personnel regularly conducted by all the Petitioners, including Saudi Arabia by virtue of its extensive control of the enterprise. It is based upon Petitioners' particular transaction with Nelson, who was recruited and hired to troubleshoot health and safety hazards at the Hospital. It is equally based upon Petitioners' particular acts in causing Nelson to be falsely imprisoned, tortured and thereby severely injured in retaliation for doing his job, and upon the breach by Petitioners of their duty as an employer to prevent Nelson's injury and warn him of job-related dangers.

All of these activities have substantial contact with the United States. To staff the Hospital, Petitioners availed themselves regularly of the U.S. labor market. They used U.S. media to recruit an American citizen to identify and correct health and safety hazards at the Hospital. They entered here on an employment relationship with Nelson, securing his services for that purpose. Notwithstanding the affirmative duties necessarily implied

by that employment relationship, Petitioners subsequently retaliated against him for doing the job that they had recruited and hired him in the United States to do. These facts provide all the substantial U.S. contact required by clause 1 of the commercial activities exception for jurisdiction over the Nelsons' action.

For purposes of resolving Petitioners' facial challenge to subject matter jurisdiction, the allegations of the Nelsons' complaint are taken to be true and generously construed in their favor. Petitioners' attempt to establish their immunity, nonetheless, on the basis of disputed facts concerning a "sovereign law enforcement" nexus with Nelson's detention and torture. This they cannot do. It is in sharp dispute whether, months earlier in the United States, Nelson's admitted misrepresentation of his educational background could or did provide the occasion for any such law enforcement action in Saudi Arabia. The record does not support that hypothesis. Moreover, Petitioners provide no factual or legal basis for concluding that the alleged wrongful acts of the Hospital or Saudi Arabia as its Owner were subsumed into or derived immunity from law enforcement or any other sovereign activity.

Arbitrary detention and torture are universally condemned under international law, prohibited under Saudi law, and especially repugnant by their nature. Such acts should not be attributed to the exercise of sovereign police powers in order to shield a foreign state's commercial enterprise. Wrongful connivance by Saudi law enforcement personnel in the Hospital's retaliation against Nelson would not derogate from the amenability of the Hospital, or of Saudi Arabia as its Owner, to U.S. jurisdiction in an action such as this, which is based on their commercial activities having substantial contact with the United States. Assuming such connivance, any legitimate U.S. foreign policy interest implicated by the Nelsons' action is of concern not under the FSIA but only under the act of state doctrine, a question not addressed by the courts below and not properly presented here.

ARGUMENT

PETITIONERS ARE NOT ENTITLED TO IMMUNITY UNDER THE FSIA

The Nelsons allege that the Hospital, Saudi Arabia as its Owner, and Royspec as one of its U.S. agents, pursued prolonged and wide-ranging commercial activity in the United States relating to the operations and staffing of the Hospital, including the recruitment and engagement of Hospital personnel; that the concerted activity of these entities—particularly the Hospital and its Owner —in the United States led Nelson to become their employee and to take on certain employment responsibilities, which he properly performed; and, notwithstanding the duties assumed by them as Nelson's employer, that they or their agents and employees negligently failed to prevent, and/or in retaliation for the proper performance of his job, wrongly caused serious injury to Nelson and his wife. As the Eleventh Circuit found, these allegations support jurisdiction under clause 1 of section 1605(a)(2) of the FSIA. (J.A. 115)

This Court has held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Here, the Hospital and Royspec seek to establish the immunity of their activities as an "agency or instrumentality of a foreign state" by virtue of Saudi Arabia's ownership. The Nelsons assert jurisdiction over them and Saudi Arabia for the same activities under a provision of the FSIA's "commercial activities" exception. Equally as to Saudi Arabia (in its capacity as Owner) and as to the Hospital and Royspec (in their capacity as

its agents), they assert liability for battery and false imprisonment, for negligence, and for derivative injury.

These claims against Saudi Arabia are based upon the fact that the Hospital and Royspec as "corporate entit[ies are] so extensively controlled by" their Owner "that a relationship of principal and agent is created." *First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba*, 562 U.S. 611, 629 (1983). The record admits no construction on which "equitable principles" might sustain the normal presumption that the Hospital has an independent status. *Id.* at 627-28. The Hospital is Saudi Arabia's creature: in the HCA contract, Saudi Arabia made it plain that "the ultimate authority for the operation of the Hospital is Owner" and that "Owner" intended to exercise such authority over the details of that operation. (J.A. 76) Nelson was Saudi Arabia's employee no less than the Hospital's: the advertisement that Nelson saw and to which he responded in the United States stated that the monitoring systems engineer would "be employed by, have a contract with, and work directly for the Government of the Kingdom of Saudi Arabia." (J.A. 25)

Indeed, for all purposes relevant to the Hospital enterprise, and certainly all those that bear on disposition of Petitioners' motion to dismiss, the Hospital and its Owner are one and the same. They are literally, as the Nelsons have alleged, "alter egos." (J.A. 17) The Eleventh Circuit accepted this allegation for purposes of its jurisdictional analysis. As to the Hospital,[13] the Petitioners have

[13] As noted, the complaint specifically alleges that Royspec is the agent and alter ego of Saudi Arabia and the Hospital. (J.A. 17) Petitioners' own witnesses describe Royspec as having been "created" by the Hospital to "assume responsibility for the [Hospital's] purchasing function in the United States." (J.A. 31) HCA identified Royspec as the point of contact for persons wishing to communicate with the Nelson family in Saudi Arabia. (J.A. 33, 96) The Eleventh Circuit also noted "that four telegrams, all of which acknowledge Nelson's employment, contain the telex designation

never challenged it. In view of Saudi Arabia's ownership and control, Petitioners assert broad immunity from the jurisdiction of our courts, pursuant to section 1604 of the FSIA, for what they characterize as exclusively sovereign or governmental conduct in Saudi Arabia—and what the Nelsons in their complaint correctly maintain was commercial activity having substantial U.S. contacts.

A. The FSIA Confers Jurisdiction Over Actions Based Upon Commercial Activities of Foreign States That Have Substantial U.S. Contact

Section 1330(a) of the FSIA strips foreign states of their jurisdictional immunity with respect to specific types of conduct described in sections 1605 to 1607. The most important of these is the "commercial activities" exception set forth in section 1605(a)(2) as follows:

> (a) A foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States *in any case*—
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> * * * *
>
> (2) *in which the action is based* [1.], *upon a commercial activity carried on in the United States by the foreign state;* or [2.] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3.] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

(Emphasis added.) Section 1603(e) of the FSIA defines "commercial activity carried on in the United States by a

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'ROSPEC,' which, according to Nelson, may be the designation for Royspec." (J.A. 114) Accordingly, on the same rationale applied as to the Hospital and its Owner, the Eleventh Circuit was correct in holding that "on the record" before it, "Royspec is within the subject matter jurisdiction" of the U.S. courts under the FSIA. (*Id.*)

foreign state," a phrase that appears *only* in clause 1 of section 1605(a)(2), to mean "commercial activity carried on by such state and having substantial contact with the United States." Section 1603(d) provides that such "commercial activity" may consist either of "a regular course of commercial conduct or a particular commercial transaction or act." Under section 1603(e), a court seeking to determine whether a given activity has the requisite "commercial character" must refer "to the nature of the course of conduct or particular transaction or act," and not "to its purpose."

Clause 1 of section 1605(a)(2) and the Act's definitions in section 1603(d) and (e) work in tandem to establish U.S. jurisdiction "in any case in which the action is based upon" a "regular course of commercial conduct or a particular commercial transaction or act" "carried on by [a foreign] state and having substantial contact with the United States." Thus, the plain language dictates that U.S. jurisdiction over a foreign state's activity hinges upon a two-step inquiry. It must be determined first, whether the action is "based upon" a "regular course of * * * conduct or a particular * * * transaction or act" that is "commercial" in nature; and second, whether the course of conduct, transaction or act has "substantial contact with the United States." *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985).

The commercial activities exception lies at the heart of the FSIA. Paralleling the two-part inquiry required by clause 1 of the Act, two broad purposes are apparent in the legislative history. First, this exception "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952," *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160, 2165 (1992), thus limiting by its *type* the conduct for which a foreign state may be held accountable; and second, it requires "some form of substantial

contact with the United States," *Verlinden*, 461 U.S. at 490, thus limiting by aspects of its *locale* the activity for which a foreign state may be held accountable in our courts.

As to the type of conduct, Congress found and declared in the FSIA that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." 28 U.S.C. § 1602. The Act reflects Congress' solicitude for the "rights of both foreign states *and* litigants in United States courts." *Id.* (emphasis added). Its history takes note of, among other things, "the growing number of disputes" between American citizens and foreign states and "expresses the desire to ensure" that "our citizens will have access to the courts in order to resolve ordinary legal disputes." *Verlinden*, 461 U.S. at 490 (citing H.R. REP. No. 1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6604-06 [hereinafter "House Report"]).[14] Accordingly, the Act ensures that "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." House Report at 7.

As noted above, the FSIA also "prescribe[s] the necessary contacts" with the United States that "must exist before our courts can exercise" jurisdiction under the Act. *Id.* at 13. Here, the Act's substantive and pro-

[14] In his statement on signing the FSIA into law, President Ford stated:

> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

12 *Weekly Compilation of Presidential Documents* 1554 (Oct. 22, 1976).

cedural standards were intended not only to address the due process requirements of "minimum jurisdictional contacts and adequate notice." *Id.* By requiring that a commercial activity has some significant connection with the United States, Congress likewise "protected against th[e] danger" posed by opening our courts " 'to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.' " *Verlinden*, 461 U.S. at 490 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 31 (1976) [hereinafter "*Hearings on H.R. 11315*"] (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice)).

Applying these standards, the Eleventh Circuit properly concluded that the district court is competent to hear the Nelsons' claims. The relevant facts as set forth in the complaint are deemed to be true and are to be generously construed in their favor absent any evidentiary hearing on subject matter jurisdiction.[15] As is shown

[15] *E.g., Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (where it is "contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based * * *, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural consideration as he would receive under a Rule 12(b)(6) consideration"). Thus, the district court's dismissal of the complaint on the basis of disputed factual allegations bearing upon the existence of subject matter jurisdiction without conducting an evidentiary hearing would have constituted plain error. *E.g., Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243 (11th Cir. 1991).

Under the FSIA, the "ultimate burden of proving immunity * * * rest[s] with the foreign state." House Report at 17. The foregoing rules are no less applicable where, as here, the foreign state

below, the various causes of action against the Hospital, its Owner, and its agent in the United States, are rooted in the employment practices of a hospital enterprise, transactions decidedly commercial in nature and having abundant contacts with the United States.

B. Nelson's Intentional Tort Claims Are Based Upon The Commercial Activities Of The Hospital

Petitioners take little note in their brief of the inherently commercial nature of the Hospital and of its employment practices, and the alleged battery, false imprisonment, and other wrongful conduct of the Hospital in its capacity as Nelson's employer. Instead of a case brought against a hospital and its owner, Petitioners would characterize the case as one brought against a police department. For this purpose, they try to put at issue the truth of numerous allegations in the complaint, and invite the Court to construe those allegations in the light least favorable to the Nelsons. This effort to recast the action necessarily fails, because it would require the Court to resolve disputed issues of fact. The proper focus is on the course of conduct, transactions or acts of the Hospital and its Owner as alleged in the complaint, rather than on the hypothesized actions and motives of an unspecified Saudi law enforcement agency. So focused, any sound analysis of clause 1 of section 1605 (a) (2) compels the conclusion that this action is "based upon" commercial activity.[16]

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seeks to meet that burden on a facial challenge to subject matter jurisdiction under the FSIA. *E.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 440 n.3 (D.C. Cir. 1990); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988).

[16] Petitioners assert that even if Nelson's claims are based upon commercial activity, the U.S. courts would still lack jurisdiction since the employment contract provides that "[i]n case of any dispute arising from this contract, the Saudi courts * * * *only* will have jurisdiction." (Pet. Br. at 8) The issue whether this provision is applicable to these claims was not passed upon by the courts below and is not properly before this Court. At any rate, the fact that an action in tort may be "based upon commercial activity" under a correct interpretation of the FSIA has no bearing upon whether, under a correct interpretation of a private contract, claims of a different nature might fall within an enforceable forum selection clause.

This Court has not had prior occasion to consider the meaning of the "based upon" requirement of section 1605 (a) (2).[17] As ever, this inquiry must begin with the statutory language. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). In clause 1 of this section, the phrase "based upon" has as its direct object words of art ("a commercial activity") that Congress took care specially to define in section 1603(d) as "a regular course of commercial conduct *or* a particular commercial transaction *or* act." (Emphasis added.) By contrast, clauses 2 and 3 of the same section are more narrowly focused, requiring that the case be "based upon" some core jurisdictional "act," rather than upon the more broadly defined "commercial activity."[18] Accordingly, the statutory language establishes that the element upon which jurisdiction uniquely depends in clause 1 (*i.e.*, that upon

[17] In *Weltover*, 112 S. Ct. at 2165, it was uncontested that the suit was "based upon" an "act" outside the United States as contemplated for purposes of "direct effect" jurisdiction under clause 3 of section 1605(a) (2)—*i.e.*, Argentina's "unilateral extension" of its debt payments.

[18] That section 1605(a) (2) contemplates a greater breadth of activity upon which jurisdiction may be based in clause 1 than in clause 2 or 3 is consistent with the overall structure of the statute. Where, as here, jurisdiction may be predicated on a course of commercial conduct or transaction, "substantial contact" with the United States is required. By contrast, the commercial activity contemplated by clause 2 is carried on elsewhere, and the basis for the action, therefore, must be found in an "act performed in the United States." In clause 3, both the act upon which the suit rests and the commercial activity with which it is connected are performed elsewhere, and jurisdiction arises only if that act has the required "direct effect" here.

which the action may be deemed to be "based" for purposes of U.S. jurisdiction) is not limited merely to a discrete act, but rather also may encompass a "transaction" or, more broadly still, a "regular course of * * * conduct," provided it is "commercial" (and has "substantial contact" with the United States).

This comparison to clauses 2 and 3 demonstrates that "the drafters of the FSIA intended no * * * niggardly construction" of what a "suit might be said to be 'based upon'" for purposes of establishing jurisdiction under clause 1. *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317, 319 (2d Cir. 1981). In its ordinary sense, the word "based" would refer to the "foundation" of the action, or that upon which it rests or stands. In that sense, the basis of an action may properly be determined with reference to "the elements of the cause of action" or "the gravamen of the complaint," *Callejo*, 764 F.2d at 1109; or the existence of some "direct causal connection" between the commercial activity and the "wrong" complained of, "giving rise to" the claims, *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 & n.22 (D.C. Cir. 1982); or evidence of "commercial activity * * * plus a theory, a gravamen, that the plaintiff's injuries arise from the commercial activity." *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992).

By this standard, the Nelsons' causes of action clearly are "based upon" a regular course of commercial conduct, or commercial transaction or act, carried on equally by the Hospital and its Owner.[19] The complaint alleges injuries that "arose from" and were "directly caused" by the Hospital's employment practices. The gravamen or

[19] Inasmuch as Mrs. Nelson's claims (J.A. 11, 16, 20) are derivative in nature, they are necessarily based upon the same commercial activities as are her husband's.

theory of the complaint relates these injuries to wrongful retaliation taken against Nelson for his job performance. The Nelsons' causes of action rest upon conduct that was "part and parcel" of the Hospital enterprise and therefore within the ambit of clause 1 of section 1605(a)(2). *Gemini Shipping*, 647 F.2d at 319.

Petitioners advance an interpretation of the "based upon" requirement that disregards the plain language of the statute, and the distinction it compels between the jurisdictional elements of clause 1 and the other two clauses of section 1605(a)(2). Their construction would limit the basis for jurisdiction under clause 1 to the particular "damage-causing acts complained of." (Pet. Br. at 18) As demonstrated above, clause 1 is not limited to "acts complained of." Moreover, even on Petitioners' construction, the focus must be on the retaliatory actions taken against Nelson for dutiful performance of his employment—actions commercial in nature. Indeed, the complaint neither does nor could allege any other act of the Hospital that might have caused Nelson's damages. Even if it were possible to identify some other Hospital conduct that caused Nelson's injuries, the result would not change. No matter what precise words are used to describe the required jurisdictional link between an action and a commercial activity, here that link is forged: from beginning to end, this action is squarely based upon the Hospital's regular course of conduct in staffing, maintaining and operating a health case enterprise. The action is equally based upon its particular transaction in engaging Nelson as an employee with specific responsibilities in that enterprise, and on its particular acts in disciplining Nelson for performing those responsibilities. As Respondents demonstrate below, such activities are commercial in nature.

1. *The Hospital, Its Employment Practices, And Its Particular Tortious Acts Against Nelson Are Commercial In Nature*

Section 1603(d) of the FSIA provides that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. Here, the course of conduct engaged in by the Hospital, and every relevant "transaction or act," has this "commercial character."

In *Weltover*, 112 S. Ct. at 2165, the Court noted that the term "commercial" was left "largely undefined" by Congress in the FSIA. Consistent with the Congressional purpose, however, *Weltover* reasoned that "commercial" should have "the meaning generally attached to that term under the restrictive theory [of sovereign immunity] at the time the statute was enacted." *Id.* Finding "significant assistance" in the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), a decision announced just six months before the FSIA was enacted, *Weltover* held that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 112 S. Ct. at 2166.

> Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," * * * the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed. 1990).

Id. (emphasis in original) (citing *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989)). *Weltover* thus directs an analysis of "the outward form of the conduct that the foreign state performs or agrees to perform" and whether it is of a nature that might likewise be engaged in by a private person or company. 112 S. Ct. at 2166-67.

Against this standard, it is clear that the Hospital acted "not as regulator of a market, but in the manner of a private player within it." *Id.* at 2166. The "provision of health care services" and employment arrangements relating to such services are not "of a peculiarly governmental nature." *Rush-Presbyterian*, 877 F.2d at 581. No less than "the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation," the operation of the Hospital necessarily involves a "regular course of commercial conduct." House Report at 16.

In particular, those aspects of the operation that relate to the recruiting, engaging, managing and disciplining of the Hospital's staff are essential to its inherently commercial mission of "provid[ing] medical services such as cancer treatment, bone marrow transplants, and kidney dialysis and transplants" to "individuals with serious, often terminal diseases." (J.A. 22) As the House Report indicates, Congress expressly intended that such activities as a "foreign government's * * * *employment or engagement* of laborers, clerical staff or public relations or marketing agents" be included "within the definition [of commercial activity]." House Report at 16 (emphasis added); *see also id.* ("employment of American citizens or third country nationals * * * in the United States" is "commercial in nature," unlike "employment of diplomatic, civil service, or military personnel").

The Hospital's engagement of Nelson and the subsequent disciplinary measures it took against him were part and parcel of its regular course of conduct in en-

gaging and supervising employees to operate the enterprise. Both in respect of its particular transaction in engaging Nelson as a monitoring systems engineer and its particular act of retribution against him for the proper performance of his assigned duties, the Hospital conducted itself in a manner indistinguishable from that in which a private hospital might have in similar circumstances. Indeed, had Hospital officials employed Nelson and then retaliated against him by wrongfully terminating his contract, there is no doubt that that transaction and its constituent acts would be deemed commercial or private under the FSIA. House Report at 19 (commercial activity would include "the wrongful discharge * * * of an employee of the foreign state"); *see also Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987). The fact that in Nelson's case the particular act of retaliation was not limited to discharge does not make it any less private or commercial in nature; that it involved detention and torture rather than routine acts and a letter of dismissal is hardly dispositive.[20]

The Hospital's activities do not lose their commercial character merely because they give rise to an action in tort rather than in contract. (Pet. Br. at 29-30) As the United States acknowledges in its brief *amicus curiae*, the FSIA contemplates that when a foreign state acts in its private or commercial capacity, it is subject to actions sounding in tort to the same extent as a private party. (Brief for the United States as *Amicus Curiae* [hereinafter "U.S. Br."] at 22) Section 1605(a)(2) is not limited by its terms to contract cases, but applies to "any case" in which the "action is based upon a commercial activity." That section 1605(a)(2) includes any tort case is unavoidably implied by the language of section 1605

[20] *See LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1409 (E.D. Va. 1988) (acts of state-owned airline in making false statements to FBI resulting in criminal indictment of its former employee are "manifestly private and commercial").

(a)(5), which provides an exception to foreign state immunity in certain cases "*not otherwise encompassed in paragraph (2)* above, in which money damages are sought against a foreign state for personal injury." (Emphasis added.) *See Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 905 F.2d 1375, 1388 (5th Cir. 1992).[21] Accordingly, under section 1605(a)(2), the courts have not hesitated to assert jurisdiction over commercial enterprises like the Hospital in actions based upon activities giving rise to liability in tort *or* contract.[22]

[21] Petitioners argue that even if this action would otherwise be maintainable under section 1605(a)(2), it is "based upon" an alleged "abuse of process" and thus barred by subsection 1605(a)(5)(B), which excludes claims arising out of "malicious prosecution" and "abuse of process," among others. (Pet. Br. at 29 n.18) Consistent with the allegations in the complaint, the short answer is that Nelson was not "prosecuted" or made the subject of any ostensible "process." Moreover, Petitioner's argument "flies directly in the face" of the statutory language:

> Section 1605(a)(5)(B) applies only in those instances "not otherwise covered in paragraph (2)." In other words, foreign states enjoy immunity from claims for libel, slander, malicious prosecution and misrepresentation *only* when the foreign state is engaged in governmental activities. Immunity does not attach under Section 1605(a)(5)(B) where * * * the activity is commercial in nature.

LeDonne, 700 F. Supp. at 1410 (emphasis in original); *accord Gilson*, 682 F.2d at 1028 n.27; *Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393, 404 (D.N.J. 1988); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 855 (S.D.N.Y. 1978).

[22] *See, e.g., Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378-80 (5th Cir. 1980); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273-75 (3d Cir. 1980); *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981) *aff'd mem.*, 760 F.2d 259 & 263 (3d Cir. 1985). This interpretation is also supported by the legislative history. House Report at 17 (section 1605(a)(2) applies to "business torts").

2. *The Alleged Law Enforcement "Nexus" Does Not Divest The Hospital's Activities Of Their Commercial Nature*

With respect to Nelson's causes of action for battery (Count X) and false imprisonment (Count XI), the complaint states that, as "a direct and proximate result of" his reporting "safety hazards [at the Hospital] to a special investigative body of the Saudi Arabian Government," Nelson was "summoned by agents or employees of [the Hospital] to the [H]ospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by persons acting at the direction, instigation, provocation, instruction or request of" the Hospital. (J.A. 13-14) Nelson's affidavit, which Petitioners made part of the record below, further charges the Hospital with knowledge of and involvement in Nelson's initial detention and torture, through a Hospital employee (the only actor Nelson was able to identify) who served as interpreter for Nelson's captors. (J.A. 59)

Petitioners would have the Court conclude that these and similar allegations of the complaint against Saudi Arabia and Royspec, assumed to be true and fairly read, point inescapably to the work of Saudi law enforcement personnel and the Saudi "law enforcement system," exercising "inherently sovereign law enforcement functions" over which there can be no U.S. jurisdiction.[23]

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[23] (Pet. Br. at 14) To support this assertion, Petitioners cite to the use in the complaint of terms such as "arrest," "prison," and "police" which principally appear in those causes of action asserted directly against Saudi Arabia and in the statement of various alternative theories of liability under international law. (Pet. Br. at 33) The significance of these terms must be weighed in accordance with the accustomed rule that the facts alleged are to be generously construed. *E.g., Scheuer*, 416 U.S. at 236-37; *Foremost-McKesson*, 905 F.2d at 440 n.3; *Gilson*, 682 F.2d at 1026. In the absence of discovery, Nelson is unable to determine whether those who falsely imprisoned and tortured him were agents or employees

The necessary implication is that any wrongful conduct by Petitioners in their commercial character was "subsumed within a sovereign activity" by some "process of law," *Foremost-McKesson*, 905 F.2d at 450, or that this conduct acquired some "derivative immunity," *Callejo*, 764 F.2d at 1109-10, to which it otherwise would not be entitled. To settle the question, Petitioners invite the Court to speculate outside the record that Saudi law enforcement personnel became involved in the normal course (presumably at the Hospital's bidding) following the discovery months earlier that Nelson had misrepresented his employment credentials during the prior year while in the United States. While uniquely possessed of the means to prove these claims, Petitioners have included no such proof in the record, and the claims are strongly disputed by the Nelsons.

Even were it possible, resolution of the issue at this stage would be inappropriate and is unnecessary. It is only necessary to determine that the alleged conduct of the Hospital and its Owner, upon which the various causes of action are based, is "commercial" in nature. The "outward form" of that conduct—broadly defined as employment practices and narrowly as employee "disciplinary procedures" [24]—is such that it might be engaged

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of the Hospital, Royspec, Saudi Arabia, or some combination thereof. The complaint asserts that, whoever they were, they were "acting at the direction, instigation, provocation, instruction or request" of the Hospital. (J.A. 14) Nelson does not dispute that by the time his detention began at "Al Sijan" ("the prison"), he was in the keeping of Saudi prison authorities.

[24] "Disciplinary procedures" is what the Hospital, in its employment contract with Nelson, called the actions it might take in the event of any "infraction" of the Hospital's "rules, regulations and policies." The contract reserved the Hospital's right to discharge him for "[s]uch infractions includ[ing] * * * forgery to obtain employment * * *." (J.A. 43-44) Even assuming that the actions visited on Nelson by the Hospital related not to the grease valve problem but to his employment credentials, therefore, those actions are no less "commercial"—being bound up with the Hospital's

in by any hospital employer.[25] Similarly, the engagement of law enforcement authorities to falsely imprison and otherwise inflict injury upon another is activity that private institutions can perform.[26] Accordingly, the commercial nature of the conduct is not lost merely because the conduct is injurious, illegal, outrageous, or has some unspecified "nexus" to allegedly sovereign activity. *See Walter Fuller Aircraft Sales, Inc.*, 965 F.2d at 1385.

Moreover, there is no basis for concluding that the Saudi government divested the Hospital, itself an inherently commercial enterprise, of its normal character and thereby cloaked it with the immunity of a police department or correctional facility. *Cf., Dunhill*, 425 U.S. at 692, 695 (unwilling, absent evidence of a "statute, decree, order or resolution" of Cuba, to infer that its agencies had been "invested with sovereign authority" to expropriate private property); *The "Gul Djemal,"* 264 U.S. 90, 95 (1924) (mere representation of master not

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overall employment practices, the internal guidelines of the hospital enterprise, and apparently a standard feature of its employment agreements. Under the HCA contract, these and all other terms of the Nelson employment agreement were expressly approved by Saudi Arabia as Owner. (J.A. 72)

[25] The complaint posits that the Hospital retaliated against Nelson for trying to correct known safety hazards, as his job required him to do. To demonstrate that such retaliation is a form of conduct well known to the marketplace, one need only consult the common law doctrine of retaliatory discharge, and the genesis of more recent federal and state statutes protecting "whistleblowers." *See, e.g., Belline v. K-Mart Corp.*, 940 F.2d 184, 186-89 (7th Cir. 1991); *White v. General Motors Corp.*, 908 F.2d 669, 671 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991); *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1153 (1st Cir. 1989); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989), N.H. REV. STAT. ANN. § 275-E (1988); OHIO REV. CODE ANN. § 4113 (Anderson 1991); PA. STAT. ANN. tit. 43, § 1423 (1986).

[26] *See, e.g., Rosario v. Amalgamated Ladies' Garment Cutters' Union*, 605 F.2d 1228, 1248 (2d Cir.), *cert. denied*, 466 U.S. 919 (1980); *Nail v. Rinker Materials Corp.*, 528 So. 2d 450, 451-52 (Fla. Dist. Ct. App. 1988).

"adequate reason to presume" immunity of government-owned vessel "not functioning in naval or military capacity but engaged in commerce"). *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), and other cases relied upon by Petitioners,[27] are simply inapposite. In *Arango*, a suit for tort and breach of contract brought against the national airline of the Dominican Republic, plaintiffs were denied entry at the Santo Domingo airport by Dominican immigration officers who "compelled [their] immediate, 'involuntary re-routing'" by the airline out of the country, "because of their inclusion on an official list of 'undesirable aliens.'" 621 F.2d at 1373. The district court dismissed claims against the airline for false imprisonment and battery. In affirming the dismissal, the Fifth Circuit reasoned that, despite the fact that the airline's activities ordinarily were commercial in character, the airline was here "entitled to the same immunity" as the government itself, by virtue of having been "impressed into service to perform these [governmental] functions * * * by Dominican immigration officials pursuant to that country's laws." *Id.* at 1379 (citing *Papagianakis v. SAMOS*, 186 F.2d 257, 261-62 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951)).

Petitioners do not claim that the Hospital was "impressed into service," compelled or even authorized to

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[27] While Petitioners cite several cases for the unremarkable proposition that police activities are sovereign in nature, these cases do not involve actions where, as here, a foreign state-owned commercial enterprise is attempting to claim some derivative immunity based on the activities of that state's police department. *E.g. Herbage v. Meese*, 747 F. Supp. 60, 66-67 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir.), *cert. denied*, 112 S. Ct. 605 (1991) (acts of British law enforcement and prosecutorial officials in obtaining plaintiff's extradition are sovereign); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 586 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (foreign state's decision not to investigate horse-back riding accident is sovereign); *Perez v. The Bahamas*, 482 F. Supp. 1208, 1210 (D.D.C. 1980), *aff'd*, 652 F.2d 186 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981) (police enforcement of Bahamian fishing laws).

perform law enforcement functions by Saudi Arabia pursuant to law, as would be required to bring the case within the rule of *Arango*.[28] Indeed, they offer no theory or proof except *ipse dixit* on which to base the proposition that the Hospital's alleged wrongful conduct is subsumed in or derives immunity from law enforcement or any other governmental activity. The Act permits such a conclusion only under extraordinary circumstances. Its history reflects an intent to affect neither "the substantive law of liability" nor "the attribution of responsibility between or among entities of a foreign state." House Report at 12. Liability for the acts of the Hospital may be attributed to the Saudi government as Owner only upon proof of such extensive control as to justify disregarding their separate juridical existence; the Petitioners' implied claim that immunity for the acts of the Hospital may be derived from the same government should depend upon no less substantial a showing that the sovereign nature of the government's functions has been transferred to the Hospital. Absent such proof, the only "sound principle," as Chief Justice Marshall remarked in a related context, is this:

> [W]hen a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824), *quoted in Hearings on H.R. 11315* at 30 (testimony of Mr. Ristau).

[28] The allegations of the complaint and undisputed facts in the record, including the absence of any indicia of regular or authorized law enforcement activity, permit only the opposite inference: that the Hospital recruited Saudi law enforcement personnel (to the extent they may have been involved) into its service—not the other way around. If discovery supports this inference, those law enforcement personnel could only be thought to have taken on the commercial character of the Hospital enterprise that enlisted them. Under these circumstances, of course, neither the Hospital nor Saudi Arabia would be entitled to any immunity under the FSIA. *See Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (holding acts of foreign embassy in assisting its state-owned shipping enterprise in extracting payments from plaintiffs were "essentially those of a collection agent, acting on behalf of its principal * * * and not that of a foreign sovereign diplomatically attempting to maintain friendly relations").

Moreover, the particular nature of the conduct alleged here—physical torture and arbitrary detention—is plainly unlawful and especially repugnant. That conduct is not of a kind lightly to be attributed to the sovereign "exercise of the police power by a foreign state" (Pet. Br. at 16 n.12), particularly (as here) for purposes of shielding that state's commercial enterprise. "Among the rights universally proclaimed by all nations * * * is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The "right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992). Similarly, the act of arbitrary and indefinite detention is universally considered a violation of international law.[29] From just these universal principles spring the alternative theories of liability asserted not against the Hospital but solely against Saudi Arabia in Counts III through VII of the

[29] *See, e.g., Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(e) (1987).

complaint. (J.A. 6-11) Whether Saudi Arabia in its sovereign capacity may be subject to U.S. jurisdiction based on these theories does not derogate from U.S. jurisdiction due the Hospital, or Saudi Arabia as its Owner, in an action (such as this) also independently based upon the Hospital's commercial activities.[30]

Even if Saudi law enforcement personnel did wrongfully connive in Nelson's torture and arbitrary detention, the purpose of the FSIA is "not to protect the sensitivities of 19th-century monarchs or the prerogatives of the 20th-century state." *Hearings on H.R. 11315* at 27 (testimony of Monroe Leigh, Legal Adviser, Department of State). Thus, as Petitioners themselves acknowledge, the Act does not look to whether the assertion of jurisdiction will implicate the political sensitivities of the foreign state in determining whether an act should be deemed commercial or sovereign. (Pet. Br. at 35)[31]

To the degree that review of the acts at issue here raises such sensitivities or "implicate[s] * * * foreign policy concerns" (Pet. Br. at 32-33),[32] those concerns

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[30] Should the Court determine that, despite their commercial setting, the Hospital's activities are indistinguishable from those of a law enforcement authority, it nonetheless should decline to extend its holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), to these activities, because they are so fundamentally at odds with the most basic and universally accepted standards of international law.

[31] *See Hearings on H.R. 11315* at 30 (testimony of Mr. Ristau) ("it is manifest now that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication").

[32] Petitioners' claim that the foreign policy interests of the United States are implicated in this case is belied by the fact that the U.S. Government asserts no such interest in its submission to this Court. The U.S. Government has described its interests as relating solely to the correct interpretation of the FSIA. (U.S. Br. at 1)

must be addressed solely with reference to the act of state doctrine. As described in the plurality opinion in *Dunhill*, the doctrine's

> major underpinning * * * is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

425 U.S. at 697.

As the issue of whether this action is barred by the act of state doctrine was not reached by the district court (J.A. 97) or by the Eleventh Circuit (J.A. 133), it is not properly before this Court. Nevertheless, it is worth noting that even if the individuals who wrongfully imprisoned and tortured Nelson were Saudi law enforcement personnel acting "under color of law," their acts were not acts of state. Petitioners represented to the district court below that it "would be contrary to Saudi law" for "any person or entity in Saudi Arabia * * * to have persons summarily arrested, detained and physically abused without legal cause." (J.A. 68) Accordingly, the acts alleged could not possibly have had the official authorization of the Saudi government and, hence, they can in no sense be characterized as official acts of state. *E.g., Filartiga*, 630 F.2d at 889; *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984).

Even if these acts could have been authorized, this Court has held that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Given the extraordinary degree of codification and consensus concerning the principle that torture and arbitrary imprisonment constitute egregious violations of international law, there is no reason to suppose that the assumption of jurisdiction

by a U.S. court would give justifiable offense to Saudi Arabia.[33]

C. Nelson's Negligence Claims Likewise Are Based Upon The Commercial Activities Of The Hospital

Respondents' negligence claims also are based upon commercial activities. Those claims, stated in Counts IX, XV, and I, against the Hospital, Royspec and Saudi Arabia, respectively, allege the breach of a duty (as Nelson's "recruiter and/or employer") to exercise due care to prevent Nelson's injury. (J.A. 5-6, 14) In particular, they assert that Petitioners breached their duty, at various times beginning with the period Nelson was recruited in the United States, to warn him of risks associated with his employment in Saudi Arabia—including the propensity of the Saudi government and Saudi institutions like the Hospital "to have persons summarily arrested, detained, and physically abused," and the risk of "severe retaliatory action" should he "attempt[] to remedy, and/or disclose[] to others any health-related or other hazards or problems" he might uncover in his job. (J.A. 5-6, 14)

Petitioners assert that in these claims Respondents merely "recast their injuries as resulting from a failure

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[33] *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984); *accord Liu v. Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 111 S. Ct. 27 (1990). Even if the alleged acts of torture and arbitrary imprisonment could somehow be described as acts of state, the doctrine would not bar this action because it does not require a court to pass upon the validity of these acts. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 407 (1990); *Sharon*, 599 F. Supp. at 546-47. The outcome of this case does not turn upon whether any alleged acts of Saudi officials in arbitrarily detaining, and torturing Nelson were valid—both Petitioners and Respondents agree that they could not have been. Instead, the ultimate issue turns upon whether these acts occurred and may be laid at the door of a hospital. The determination of this issue does not implicate the act of state doctrine. *W.S. Kirkpatrick*, 493 U.S. at 407; *Sharon*, 599 F. Supp. at 545.

to warn," and they argue that the "gravamen of the[] complaint" is not a duty to warn, but "the alleged wrongful arrest, false imprisonment, and torture." [34] (Pet. Br. at 38) This argument is unavailing because the negligence counts of the complaint proceed from an independent duty of the Hospital, its Owner, and Royspec its agent, as Nelson's "recruiter and/or employer," to *prevent* his injury,[35] including a specific duty to warn him of readily foreseeable dangers associated with his job.[36] Whether these dangers are confined to "foreign law enforcement practices" (U.S. Br. at 26), or more broadly may encompass the foreign state's own employment practices overseas, the underlying duties at common law are commercial in nature.

Whatever standards of conduct the FSIA may permit U.S. courts to enforce against the Hospital and its Owner with respect to their imprisoning and torturing those

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[34] Petitioners cite *United States v. Shearer*, 473 U.S. 52 (1985), in which the Court held that a claim against the United States for negligent supervision, giving rise to kidnapping and murder, was barred by the Federal Tort Claims Act ("FTCA"). *Shearer* did not involve an independent duty as exists here. *See, e.g., Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988); *Kearney v. United States*, 815 F.2d 535, 537 (9th Cir. 1987). Moreover, its conclusion was impelled by the "sweeping language" of section 2680(h) of the FTCA, which "*excludes* any claim *arising out of* assault or battery," including one that may "sound in negligence but stem from a battery." *Shearer*, 473 U.S. at 55 (emphasis added and in original). By contrast, section 1605(a)(2) of the FSIA *includes* "any case" in which "the action is based upon a commercial activity."

[35] Thus, if torture at the hands of Saudi "law enforcement" is a foreseeable consequence of one's detention there, then Petitioners breached their general duty to prevent Nelson's injury by (as the complaint alleges) wrongly causing Nelson's arrest or detention.

[36] The Hospital's failure to warn Nelson that the performance of job related functions might expose him to such "law enforcement" practices likewise would breach its duty. *E.g., Richards v. Harrison*, 262 So. 2d 258, 260 (Fla. Dist. Ct. App. 1972).

Americans in Saudi Arabia whom they have recruited and employed here, such recruitment and employment activity clearly is "commercial" in character. Similarly, when a foreign state and its instrumentality conduct such activity in this country, they are acting in a manner indistinguishable from a private employer and are subject to federal and state laws governing the hiring of employees, including the common law of torts.[37] Accordingly, when they violate these statutes or breach their duties under the common law, they should be subject to the jurisdiction of the U.S. courts under the commercial activities exception.

This conclusion loses none of its force merely because such review might require an examination of the Hospital's employment practices or even an "expansive inquiry into police practices of Saudi Arabia." (Pet. Br. at 38) Petitioners' understandable concern to avoid such a review is irrelevant to the determination of whether it may as a foreign state lay claim to immunity for its commercial activities where, as here, the action rests upon conduct having abundant contact with the United States.

D. The Commercial Activities Of The Hospital Have Substantial Contact With The United States

Respondents have demonstrated that their actions against the Hospital and its Owner are based upon a regular course of commercial conduct or a specific commercial transaction or act as required by clause 1 of section 1605(a)(2) and its companion definitions in sections 1603(d) and (e). Because the same conduct, transactions or acts have "substantial contact" with the United States, the FSIA confers jurisdiction over these causes of action.

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[37] *See Arango*, 621 F.2d at 1380 (claims based on state-owned airline's failure to warn of danger that passengers may not be permitted to enter Dominican Republic stem from "commercial activity" and hence are not barred by the FSIA).

In its *amicus* brief, the United States suggests that clause 1 restricts jurisdiction to cases in which the commercial activities providing the basis for the claim, occur in this country. (U.S. Br. at 23) This limiting construction directly conflicts with the plain language, structure, and underlying purposes of the FSIA.

Section 1603(e) specifically defines "commercial activity carried on in the United States by a foreign state," a phrase that appears only in clause 1, to mean "activity carried on by such [foreign] state and having substantial contact with the United States." This language does not limit the commercial activity upon which the action is based to events or occurrences in the United States. Rather, as Petitioners themselves acknowledge, it means what it says: it merely requires that this commercial activity—much or all of which may have occurred elsewhere—have some "substantial contact with the United States." 28 U.S.C. § 1603(e).[38] (Pet. Br. at 22)

The language of clause 2 lends strong support to this common-sense reading of the first clause of section 1605(a)(2). By contrast to clause 1 and its "substantial

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[38] *E.g., Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980). In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) (per curiam), the Fifth Circuit rejected a "literal" interpretation of clause 1, which would have required the commercial activity upon which the action is based to occur in the United States. *Id.* at 200. The court found this interpretation to be inconsistent with the statutory purpose and, instead, adopted a nexus approach that would support jurisdiction here. *Id.* at 202. *Vencedora* overlooked the significance for clause 1 of the definition in section 1603(e) and thus was wrong in believing that its approach compromised the "literal" statutory language. Indeed, under the approach *Vencedora* rejected, the "substantial contact" definition set forth in section 1603(e) would have been rendered meaningless. At any rate, *Vencedora*'s "nexus" test has been widely accepted and its application has not turned U.S. courts into "small international courts of claims." *Verlinden*, 461 U.S. at 490.

contact" standard, clause 2 requires that the action be "based * * * upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." (Emphasis added.) Thus, when Congress chose to limit the jurisdictionally significant conduct to an act, event or occurrence taking place in the United States, it knew how to make that limitation clear in the statute. *See Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273 (3d Cir. 1980).

Fundamental principles of statutory interpretation dictate that the language of clause 1 of section 1605(a)(2) and the companion definition be construed in accordance with their literal meaning unless it can be demonstrated that such "'literal application [would] produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Here, a literal reading is entirely consistent with the statutory purpose. That the FSIA prescribes some form of significant contact with the United States reflects Congress' underlying purpose to meet the demands of due process and avoid the risk of transforming our courts into "small international courts of claims" ready to resolve disputes between private parties and foreign states "anywhere in the world." *Verlinden*, 461 U.S. at 490 (quoting *Hearings on H.R. 11315, supra* at 31 (testimony of Mr. Ristau). The language of clause 1, incorporating terms expressly defined in section 1603(e), demonstrates that these Congressional purposes are fully served by a requirement that the particular commercial transaction or act or regular course of commercial conduct upon which the claim is based have substantial U.S. contact.[39]

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[39] Congress found it "advisable" in clause 2 "to provide expressly for the case where a claim arises out of a specific act in the United States" and noted "that the acts (or omissions) encompassed in this category [i.e., clause 2] are limited to those which in and of themselves are sufficient to form the basis of a cause of action." House Report at 19. Far from supporting either the position of Petitioners or that of the U.S. Government, this House Report language only serves to confirm that the activities encompassed in clause 1 are not so limited.

While the "substantial contact" standard of clause 1 of section 1605(a)(2) does not limit the basis for the action to commercial events or occurrences in the United States, it nonetheless demands more than the mere "U.S. citizenship or U.S. residence of the plaintiff." House Report at 17. Nor does it suffice that, but for the performance of some commercial activity in the United States, the plaintiff would not have been present in a foreign state. *E.g., Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). Instead, as the great majority of circuit courts have held, clause 1 requires that there be a "material connection" (a "nexus") between the commercial activity upon which the action is based and an act or series of acts that is performed in the United States.[40] This requirement of a "material connection" is faithful to the "substantial contact" standard laid down by Congress in the statute itself.[41]

Here, relevant operations of the Hospital have not just some material connection or substantial contact with the United States. From its very inception through at least the time Nelson was detained and tortured, the Hospital was critically dependent upon and, in that sense, owed its very existence to, the recruitment from the United States of skilled expatriate personnel for its "med-

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[40] *E.g., Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir.), *cert. denied*, 484 U.S. 964 (1987); *Sugarman*, 626 F.2d at 272-73; *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d at 220; *Siderman de Blake*, 965 F.2d at 709.

[41] It is also consistent with the legislative history. *See* House Report at 13 (describing jurisdictional exceptions in section 1605 as "requir[ing] some connection between the lawsuit and the United States"); *id.* at 18 (describing section 1605(a)(2) as an exception for "[c]ommercial activities having a nexus with the United States").

ical city," including the state-of-the-art, 245-bed hospital. (J.A. 25, 71)

Thus, in 1973, Saudi Arabia and the Hospital engaged an American corporation from its offices in Tennessee as their agent to "recruit and employ administrative, nursing, technical, maintenance and all other personnel" "required to open and operate the Hospital." (J.A. 72-73) As part of a "worldwide" recruitment effort, HCA undertook to engage "expatriate personnel" in the United States to work in Saudi Arabia at the Hospital. In 1983, as a small part of this ongoing program, HCA advertised in the American media for a systems engineer. There is nothing to suggest that what ensued makes the Hospital's activities in engaging Nelson different from its activities in engaging the multitude of other expatriate personnel presumably required for full staffing and proper operation of the Hospital. Nelson read an advertisement in the United States. The Hospital communicated with HCA in Tennessee authorizing it to hire Nelson. HCA thereafter successfully recruited him in the United States to fill the position. An employment contract was signed by both parties in the United States. Before departing for Saudi Arabia, Nelson completed various application, processing and medical screening and orientation requirements in the United States.

In light of this record, it is extraordinary that Petitioners should characterize Nelson's signing of an employment contract in the United States as "a fortuitous happenstance" and its contacts with the United States as so "limited" that they "would not provide even the 'minimum contacts' necessary under the due process clause for personal jurisdiction." (Pet. Br. at 46) The Hospital's (and, as its Owner, Saudia Arabia's) contacts with the United States—sustained for more than a decade at the time of Nelson's wrongful imprisonment and torture—were deliberate, extensive, and continuous. In short, they are vastly greater than would be required to meet the

substantial contact requirement of section 1605(a)(2), much less to raise a "reasonabl[e] anticipat[ion of] being haled into court."[42] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The United States suggests that "it is not so clear" that the Hospital (as opposed to its Owner) "has carried on a commercial activity in this country." (U.S. Br. at 14 n.9, 24 n.16) Here, the United States directly contradicts Petitioners' own sworn declaration that the "[Hospital] has a contract with HCA vesting [in it] exclusive responsibility for recruiting in the U.S." (J.A. 30), and the admission in Petitioners' brief (Pet. Br. at 48) that the recruitment of Nelson himself "was performed * * * by HCA, as required by the terms of the contract between HCA and the Hospital."[43] It is apparent that the Hospital, directly and through its agents, had substantial contacts in the United States consisting at the very least of employee recruitment, advertising, hiring, and training, all as alleged in the complaint. (J.A. 13)

These substantial U.S. contacts of the Hospital and Saudi Arabia as its Owner are not only relevant to Nelson's claims, they provide the precise factual context in which those claims arise. Petitioners chose to avail themselves extensively of our employment market. They entered here on an employment relationship with Nelson. They defined here the object of that relationship—namely,

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[42] Petitioners urge (Pet. Br. at 44 n.25) that the U.S. contacts of a commercial agent such as HCA should not be attributed to a "foreign state" principal (presumably including its agency or instrumentality) for jurisdictional purposes. As the United States implicitly recognizes in its *amicus* brief (U.S. Br. at 13-14), such a construction would render the commercial activities exception meaningless. *See Gilson*, 682 F.2d at 1026 n.16; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d at 453.

[43] Indeed, for all relevant purposes, as Petitioners appear to concede, the Hospital's commercial activities in the United States were coextensive with those of Saudi Arabia as its Owner.

securing Nelson's services to maintain the Hospital's systems in safe order. They retaliated against him for the faithful performance of precisely those services that they here recruited and engaged him to perform. Although nothing more is required by section 1605(a)(2), these same U.S. contacts are essential to any legal understanding of Nelson's claims. At a minimum, the alleged acts of retaliation are fundamentally at odds with the "reasonable diligence" and the "watchfulness, caution, and foresight" necessarily "implie[d] * * * as between the employer and employee." *Wabash Ry. v. McDaniels*, 107 U.S. 454, 460 (1883).[44]

Respondents do not argue that the "substantial contact" requirement of clause 1 of section 1605(a)(2) is satisfied simply because, "but for" Nelson's recruitment and engagement in the United States, "he would not have worked in Saudi Arabia, and therefore, he would not have been arrested, imprisoned, or allegedly tortured." (Pet. Br. at 39-40) Rather, the fact that Petitioners were engaged in a regular course of recruitment and employment in the United States, the circumstances of the particular transaction by which they engaged Nelson in the United States, the reasons for which they hired him and for which they later injured him (*i.e.*, his "troubleshooting" Hospital systems), and the minimum affirmative duty of care necessarily implied out of that employment relationship established here—singly or together—supply all the material connection or substantial contact required under clause 1 with respect to Nelson's intentional tort claims.

Petitioners also argue that Nelson's negligence claims have no substantial contact with the United States. In particular, they state that any duty to warn Nelson of the job-related dangers identified in the complaint arose in Saudi Arabia, "the overwhelmingly logical place for any

[44] Evidence that the retaliation was occasioned not by Nelson's "whistleblowing" but by his false credentials would not detract from any limited obligation of ordinary care on the Hospital and Saudi Arabia.

such warning to have occurred."[45] (Pet. Br. at 44) Even accepting this logic, the negligence claims retain their substantial contact with the United States. As discussed *supra* at 41-43, clause 1 of section 1605(a)(2) does not limit the commercial activity upon which such claims are based to acts or omissions in this country. It requires, by its literal terms, only that they have substantial contact here. Given the intimate connection between the United States and the employment relationship out of which the Hospital's duty of care to prevent Nelson's injury and to warn of danger arises, the commercial activity upon which his negligence claim is based clearly has "substantial contact" with the United States.

Even assuming, however, that the relevant commercial activity must itself occur in the United States, Petitioners are wrong in their assertion that their duties to Nelson arose *after* he left for Saudi Arabia and that breach of such duties could only have occurred there. The Hospital could and should have warned Nelson of the dangers associated with employment before he signed his contract, and it certainly had a duty to do so no later than the point in time at which he had become obligated under that agreement.[46] The contract was executed by Nelson in the United States well before he attended the Hospital employee "orientation" program or departed for Saudi Arabia. The Hospital's duty to warn therefore arose in the United States, and its breach of that duty provides the substantial contact with the United States required for jurisdiction under clause 1 of section 1605(a)(2).

[45] This "logic" appears to be compelled principally by the fact that Petitioners' own "Saudi Arabian advocate" has opined that "Saudi Arabian law does not impose a duty on a recruiter or employer of labour to warn employees of any such hazard" and "an employer will not be liable for failure to warn the employee of such hazards as are alleged by [Nelson], either in advance of his employment or during the same." (J.A. 68)

[46] W. PAGE KEETON, PROSSER AND KEETON ON TORTS 380 (1984) (common law duties arise at creation of master/servant relationship).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed and the case remanded for further proceedings.

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STATUTORY APPENDIX

1. Section 1602 of the Foreign Sovereign Immunities Act provides:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. Section 1603(a) of the Foreign Sovereign Immunities Act provides:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

3. Section 1603(b) of the Foreign Sovereign Immunities Act provides:

> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision, thereof, or a majority of whose shares or other ownership interest is

owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

4. Section 1603(d) of the Foreign Sovereign Immunities Act provides:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

5. Section 1603(e) of the Foreign Sovereign Immunities Act provides:

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

6. Section 1605 of the Foreign Sovereign Immunities Act provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity

of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

* * * *

(12)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners Saudi Arabia, King Faisal Specialist Hospital (KFSH or the Hospital), and Royspec respectfully submit this reply brief in response to the brief of Respondents Scott Nelson and Vivian Nelson.[1]

SUMMARY OF ARGUMENT

Petitioners have demonstrated that Respondents' claims are not "based upon a commercial activity carried on in the United States" within the meaning of the "commercial activity" exception of the Foreign Sovereign Immunities Act (FSIA or the Act). Under the plain meaning of Section 1605(a)(2), a suit is "based upon" commercial activity only if the foreign state conduct that allegedly injured the plaintiff is commercial in nature. Brief for Petitioners (Pet. Br.) 18-25. This case alleges injuries occurring entirely in Saudi Arabia as a result of the arrest and imprisonment of Respondent by Saudi government officials. Because such acts cannot possibly be characterized as having a *commercial nature*, the "commercial activity" exception does not create jurisdiction over Petitioners.

In the face of this showing, Respondents have radically altered their theory of the statute and of the case. Having argued in both the district court and the court of appeals that "based upon" means "having a nexus with," Respondents now jettison this "jurisdictional nexus" test (the express basis of the Eleventh Circuit's decision) and proffer instead a new and equally erroneous construction of the "commercial activity" exception. Brief for Respondents (Resp. Br.) 23-25. Respondents finally acknowledge "that police activities are sovereign in nature," *id.* 33 n.27, but now claim that their case has nothing to do with Saudi law enforcement actions notwithstanding that the complaint, Respondent's sworn affidavit, his congressional

[1] When used in the singular herein, "Respondent" shall refer to Scott Nelson only.

testimony, and all his prior briefs complained of wrongful arrest and imprisonment, torture, and similar misconduct by Saudi police, prison officials, and other government agents and employees acting in their official capacity and under color of law. Instead, Respondents now depict the case as merely involving the "employment practices" and "employee 'disciplinary procedures' " of the Hospital acting in a "commercial setting," *id.* 31, 36 n.30, and suggest that rather than directly challenging the conduct of the government of Saudi Arabia, they are merely pursuing employment-related claims against the Hospital and Saudi Arabia as its "Owner."

These recharacterizations of the case are untenable. More important, Respondents' new legal theory fails for precisely the same reasons as their earlier arguments. Respondents seek a ruling that the FSIA's "commercial activity" exception confers jurisdiction whenever a suit challenges a foreign state act that has *some relationship* to commercial activities of that foreign state; specifically, they contend that "every relevant 'transaction or act' " in this case had a commercial character because it related to Respondent's employment by the Hospital. *Id.* 26, 32. Under this theory, there is no type of foreign sovereign conduct that is immune from suit in United States courts. Such a limitless construction of the FSIA's "commercial activity" exception is impermissible under both the statutory language and this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992), which make crystal clear that jurisdiction hinges not on the *purpose* for a foreign sovereign's actions, but on the intrinsic *nature* of those actions. Arrest and imprisonment of Respondent by Saudi government officials acting in their official capacity are manifestly *not* actions of a commercial nature, and therefore cannot support jurisdiction under the "commercial activity" exception, regardless of whether they occurred in a supposed "commercial setting," Resp. Br. 36 n.30, or were carried out for a commercial purpose. Such inherently governmental acts —*actiones jure imperii*—are immune from suit under the FSIA.

In the alternative, even if this action could somehow be said to be based upon commercial activity, Respondents have failed to show that such activity had the requisite "substantial contact with the United States." 28 U.S.C. § 1603(e) (1988). Every act of arguable significance to Respondents' claims—*e.g.*, the performance of the employment contract, the alleged reporting of safety violations at the Hospital, the arrest and imprisonment, and the alleged injuries from mistreatment in prison—occurred solely in Saudi Arabia. Pet. Br. 42-43. Respondents' effort to sidestep these undisputed facts, by focusing instead on Petitioners' alleged overall level of "recruitment" activity in the United States, is unavailing. Section 1605(a)(2) does not authorize jurisdiction merely because a foreign state does business in the United States. Jurisdiction cannot exist here because the *particular* commercial activity on which Respondents argue the claims are based did not have substantial contact with the United States.

ARGUMENT

I. THE COMPLAINT IS NOT "BASED UPON COMMERCIAL ACTIVITY" WITHIN THE MEANING OF CLAUSE ONE OF SECTION 1605(A)(2)

A. Respondents' Interpretation Contravenes The Language, History And Purpose Of The FSIA

The court of appeals held that an action is "based upon" commercial activity under Clause One of Section 1605(a)(2) "when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity." J.A. 109. This "jurisdictional nexus" test was expressly advocated by Respondents in the courts below. *See, e.g.*, Appellants' Brief, filed January 4, 1992 at 27-28 (advocating the "nexus" approach and arguing that jurisdiction exists because of "the relation or connection of the acts complained of (arbitrary detention and torture) and the defendants' commercial activity in the United States (recruitment and other acts)"). As demonstrated at Pet. Br. 18-20, this "nexus" test contravenes the plain meaning of "based

upon" in Section 1605(a)(2), which is that the very *basis* or *foundation* of a civil action—*i.e.*, the "acts for which damages are sought" (to use the Eleventh Circuit's words) or "the acts complained of" (to use Respondents' words)—must be commercial in nature. It is not sufficient that the acts complained of merely have a "nexus" or "connection" or "relationship" with other commercial conduct of the foreign state. To hold otherwise would contravene the FSIA's mandate that the distinction between commercial and governmental acts must turn on the *nature* of the foreign state's conduct rather than its *purpose*, *see* Pet. Br. 20-21 (discussing 28 U.S.C. § 1603(d) as construed in *Weltover*), as well as defeat Congress's purpose in enacting the restrictive principle of sovereign immunity under which acts of an inherently governmental nature (*actiones jure imperii*) are immune from suit in United States courts. *See* Pet. Br. 25-31.

Respondents' brief abandons their former "jurisdictional nexus" theory and acknowledges that, just as Petitioners have argued, "[i]n its ordinary sense, the word 'based' would refer to the 'foundation' of the action, or that upon which it rests or stands," Resp. Br. 24, and that "the basis of an action may properly be determined with reference to 'the elements of the cause of action or the gravamen of the complaint.'" *Id.* (citation omitted). But having abandoned the "nexus" construction of "based upon," Respondents then go on to construct a new argument that leads to the same impermissible end. Citing Section 1603(d)'s definition of "commercial activity" as either "a regular course of commercial conduct or a particular commercial transaction or act," Respondents argue that whenever a foreign state engages in any "regular course of commercial conduct," *all* actions of that state that allegedly "aris[e] from" or are "part and parcel of" or are "rooted in" or "relate" to or are "bound up with" that course of conduct are necessarily commercial. *Id.* 22, 24, 25, 31 n.24. Asserting that their case "is squarely based upon the Hospital's regular course of conduct in staffing, maintaining and operating a health [care] enterprise," *id.* at 25, and that the Hospital is "an inherently commercial enterprise," *id.* at 27, 32, Respondents conclude that *every* act taken in that supposed "commercial setting" is by definition a commercial act. *Id.* 24-25. This novel and limitless theory must be rejected for numerous reasons.

First, Respondents' new argument essentially reintroduces the "nexus" concept in another guise. By their various formulations—*e.g.*, that Respondent's arrest and imprisonment were "part and parcel of" or "arose from" or were "rooted in" the Hospital's ordinary commercial activities[2]—Respondents again are contending that jurisdiction may exist whenever the acts complained of (here, arrest and imprisonment) are *related to* commercial activities. Just as such a "relationship" or "nexus" test cannot be found in the "based upon" language, it also cannot be read into Section 1603(d)'s definition of "commercial activity."[3] By defining "commercial activity" to

[2] In pulling these various phrases from lower court opinions, Respondents confuse authority discussing whether *indisputedly commercial activity* has "substantial contact" with the United States with authority concerning whether an action is based upon commercial activity at all. *See* Pet. Br. 21-22. For example, *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981), does not support Respondents' contention that Clause One extends jurisdiction to any conduct, even if sovereign in nature, which is "part and parcel of" a regular course of commercial conduct. In that case, it was "clear beyond doubt" that the specific conduct complained of—the breach of a contractual guarantee—was commercial, and the court used the "part and parcel of" language solely in addressing the separate issue of whether the breach had "substantial contact with the United States." *Id.* at 319. The same is true with respect to the use of the phrase "arises from" in *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1657 (1992).

[3] Respondents' argument that "based upon" as used in Clause One of Section 1605(a)(2) has a different and broader meaning than in Clause Two, Resp. Br. 23, is contradicted by the legislative history explaining the reason for adopting Clause Two:

> Although some or all of these acts might be considered to be a "commercial activity carried on in the United States" as broadly

encompass either "a regular course of commercial conduct or a particular commercial transaction or act," Section 1603(d) simply ensures that a foreign state cannot avoid suit on a theory that the commercial act on which a claim is based was merely a one-time or limited act rather than part of a larger or regular course of conduct. *See* House Report at 17.

Contrary to Respondents' argument, however, this definition of "commercial activity" does *not* establish that if a foreign state creates an agency or instrumentality to engage in a regular course of commercial conduct, *all* acts taken by or in connection with that "enterprise" are *ipso facto* commercial and sovereign immunity is unavailable.[4] The nature of the particular acts complained of, not the general purposes of the foreign state "enterprise," is controlling under the "commercial activity" exception. *See* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act,

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> defined in § 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19 (1976) [hereinafter House Report]. Thus, the difference is simply that in Clause Two, the act forming the basis of the cause of action must have occurred in the United States, whereas in Clause One, the act forming the basis of the cause of action may have occurred elsewhere so long as it had "substantial contact" with the United States. But in either case, "based upon" means the same thing: jurisdiction exists only if the particular conduct complained of (the basis of the action) is commercial. *See* Pet. Br. 19 n.14.

[4] The FSIA "starts from a premise of immunity and then creates exceptions to the general principle." House Report at 17; *accord* 28 U.S.C. § 1604. This presumption of immunity applies fully to "a political subdivision of a foreign state or an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), a category which Respondents concede encompasses the Hospital. Resp. Br. 3.

rather than by reference to its purpose."). For example, a foreign government may be sued under the "commercial activity" exception for breaching a contract to purchase provisions for its armed forces, notwithstanding that maintaining an army is a uniquely non-commercial "enterprise," because the particular conduct on which the claim is based (breach of contract) is commercial in nature. *See* House Report at 15-16. Conversely, even if a foreign state engages in a regular course of commercial conduct, it will be immune from suit where the particular acts complained of are public in nature.

In sum, Respondents' new theory of the statute fails because "based upon commercial activity" does not encompass any commercial conduct connected with or relating to a claim, but only the particular conduct alleged to have injured the claimant. *See Weltover*, 112 S. Ct. at 2166 ("[T]he issue is whether the *particular actions* that the foreign sovereign performs (whatever the motivation behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'") (emphasis added)). No court has adopted Respondents' theory that "inherently commercial enterprises" are deprived of immunity for even noncommercial, sovereign conduct,[5] and such a theory is incompatible with the stat-

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[5] Even where a foreign state generally engages in a commercial venture, the lower courts have uniformly refused to exercise jurisdiction unless the *particular* acts complained of were themselves commercial. *See, e.g., Millen Indus. Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879 (D.C. Cir. 1988) (Clause One may provide jurisdiction over foreign state defendant acting as "public relations agent and broker" only for claims based upon promise to help expedite customs but not for claims based upon promises that plaintiffs would receive duty-free treatment); *cf. Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (FSIA does not permit execution of judgment against state-owned airline where the act in question, state-sponsored terrorism, was not commercial), *cert. denied*, 471 U.S. 1125 (1985). Similarly, the authority cited by Respondents themselves, *see* Resp. Br. 29 n.22, permitted jurisdiction under Clause One *only* where the specific conduct complained of was commercial. *Compare Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378-80 (5th Cir. 1980) (state-owned airline

ute and this Court's decision in *Weltover*. Petitioners are immune from suit in this case because the conduct at issue, irrespective of its connection to the supposed "inherently commercial" purposes of the Hospital,[6] is sovereign in nature.

B. Respondents' Intentional Tort Claims Are Based Upon Governmental Rather Than Commercial Conduct, And Therefore Cannot Be Adjudicated Under The "Commercial Activity" Exception

Necessarily acknowledging that governmental law enforcement conduct is sovereign in nature, Resp. Br. 30 n.23, 33 n.27, 36 n.30, Respondents try to rewrite their complaint and revise their allegations so as to appear to challenge only employment-related commercial acts. They complain that "[i]nstead of a case brought against a hospital and its owner, Petitioners would characterize the case as one brought against a police department," and they profess puzzlement that anyone would think the case challenged "Saudi law enforcement activity." *Id.* 22. Respondents portray their claims as merely implicating "employment practices" and "disciplinary measures" of the Hospital, *id.* 26-28, 32 n.25; urge that *any* Hospital action whatever is "inherently commercial" in nature, *id.* 14, 22, 32; argue that Saudi Arabia as "Owner" is the "alter ego" of the Hospital and therefore is vicariously liable for the Hospital's supposed commercial acts, *id.* 31-36; and

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immune from suit for false imprisonment and battery where acts of "involuntary re-routing" complained of were acts of immigration control) *with Ohntrup v. Firearms Ctr., Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 & 263 (3d Cir. 1985) (Clause One provided jurisdiction over product liability action against state-owned manufacturer of firearms where gravamen of complaint was malfunctioning of firearm).

[6] In addition to being irrelevant, Respondents' repeated assertion that the Hospital is an "inherently commercial" enterprise, Resp. Br. 14, 22, 32, is unsupported by the record. The fact that the Hospital has purchased materials and hired employees does not mean that *all* activities of the Hospital are "the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 112 S. Ct. at 2166.

conclude that to the extent Saudi law enforcement personnel became involved in the so-called employee disciplinary measures, "those law enforcement personnel . . . could only be thought to have taken on the commercial character of the Hospital enterprise that enlisted them." *Id.* 34 n.28. This reconstructed theory of the case is meritless on both the facts and the law.

First, Respondents' effort to recast this as an "employment practices" case, rather than one alleging injury from improper exercise of governmental police powers, is incredible. The suggestion that the "core of the complaint" is not the first eight counts against Saudi Arabia but rather Counts IX to XII against KFSH, *see id.* 10, is self-evidently implausible. More important, Respondents' own words, in the complaint and elsewhere, reveal that they challenge a foreign government's alleged improper exercise of sovereign power, not the commercial acts of a "hospital enterprise." For example, Respondents have alleged that Respondent was "arrested," J.A. 56, 59, 60; that he was "taken to the Criminal Investigation Division," J.A. 58; that agents or employees of Saudi Arabia "acting in their official capacity" mistreated and injured him in "a jail cell," J.A. 5; that "police investigators" "repeatedly interrogated" him, J.A. 5; and that he was held in custody at Al Sijan Prison "to await trial." J.A. 59. Respondents have emphatically contended at every stage of this case that *all* of the alleged actions of *all* of the Petitioners were taken "under color of law." *See* Respondents' Brief in Opposition to Petition for Certiorari at 7; Appellants' Brief at 6; R. 83, 12-27. Respondents simply cannot be heard to say that their complaint does not allege that their injuries resulted from the wrongful exercise of the uniquely *governmental* power to arrest, interrogate, and imprison individuals.[7]

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[7] Having filled the complaint with terms such as "arrest," "prison," and "police," Respondents now contend that "[t]he significance of these terms must be weighed in accordance with the accustomed rule that the facts alleged are to be generously construed." Resp. Br. 30 n.23. Respondents thus seek to hold out the possibility

Respondents try to avoid this fact by emphasizing the alleged retaliatory motive for the arrest and imprisonment. Asserting that wrongful discharge by the Hospital would have been a commercial act, Respondents reason that "[t]he fact that in [Respondent's] case the particular act of retaliation was not limited to discharge does not make it any less private or commercial in nature; that it involved detention and torture rather than routine acts and a letter of dismissal is hardly dispositive." Resp. Br. 28. But this difference in the nature of the conduct at issue *is* dispositive, because the FSIA makes it so. This case is not about wrongful termination or other breach of contract, as Respondents have taken pains to make clear,[8] but rather is about alleged wrongful arrest and imprisonment by Saudi officials acting under color of law. Even if the latter conduct had a retaliatory *purpose*, the FSIA jurisdictional inquiry depends solely on the *nature* of the conduct.

Thus, Respondents' diversionary effort to create a supposed issue of fact by denying that Respondent was arrested and imprisoned for falsifying his academic credentials, *id.* 9 nn. 8-9, is beside the point. In fact, Respondent admits that he lied about his academic credentials, *id.* 9;[9] there is indisputable documentary evidence

htat their complaint really means "not the police" or "not a Saudi prison" or "not an arrest"—a reading that no amount of generosity can permit. Moreover, Respondents' claim of uncertainty as to whether Saudi government personnel were involved in the alleged wrongful acts, *see, e.g., id.* 30 n.23, 34 n.28, is belied by all of Respondent's many prior allegations, which allege the involvement of particular law enforcement agencies (such as the "Criminal Investigative Division" and the "Head of the Prison"), J.A. 53, and even particular individuals (such as "Lt. Addullah Aziz" and "Captain Mohammed of the prison"), J.A. 59, 60.

[8] *See* R. 29, 7 (Respondents conceded that their claims are not "disputes relating to the contract"). An apparent reason for this position is that Respondent's contract provides that "[i]n the case of any dispute arising from this contract, the Saudi courts, authorities or commissions only will have jurisdiction." J.A. 47.

[9] Respondent claims that he has acknowledged his misrepresentations ever "since 1984," Resp. Br. 9, but at the 1987 congressional

that, *before* his arrest, Respondent was aware that his submission of a forged diploma had come to light and was under investigation, R. 29, Pl.'s Ex. 4; and a State Department report submitted to Congress demonstrates that a U.S. consular officer who visited Respondent in prison was told that Respondent "was arrested for having presented Saudi officials a fraudulent college degree from MIT as proof of job qualifications." J.A. 64.[10]

More important, the resolution of this dispute as to *why* Respondent was arrested and imprisoned is irrelevant to the jurisdictional issue and, indeed, is exactly the inquiry as to which Petitioners are immune under the FSIA.[11] By continuously characterizing the arrest and

hearing he made no mention of them and insisted repeatedly that there was no possible explanation for his arrest other than his reporting of alleged safety violations. Respondent's effort to parse his exchange with Congressman Lantos so as to avoid acknowledging that he misled Congress, *see id.* 9 n.9, is unavailing. Respondent was not asked only if he had been charged with a crime, as Respondents suggest, but also whether "[t]he only thing [he] did [to prompt the arrest] was call attention to unsafe conditions at the hospital where [he] worked." J.A. 62. Respondent answered, "Yes," despite knowing full well that his own deceitful conduct had been uncovered and was under scrutiny before his arrest.

[10] Respondents' contention that this State Department report, which reflects a consular officer's contemporaneous first-hand knowledge, "has no evidentiary value," Resp. Br. 9 n.9, is baseless. Equally meritless is their suggestion, *see id.*, that this report was disavowed by two other State Department officials who, lacking any first-hand knowledge concerning Respondent's case, merely stated generally that they had no basis to dispute the allegations of the various witnesses who testified at the 1987 congressional hearing. *See, e.g.*, J.A. 65-66 (testimony of Marion D. Creekmore, Deputy Assistant Secretary of State) (asked about the "veracity of the witnesses," he responded, "I was not here for all of it . . . . I will simply, without being able to be absolutely certain about it, take what they say.").

[11] Respondents' suggestion that the district court should have conducted an evidentiary hearing on this factual dispute, Resp. Br. 21 n.15, ignores the fact that immunity involves protection from suit, "not a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). An evidentiary hearing on why Respond-

imprisonment as "retaliatory" or "disciplinary," *see* Resp. Br. 2, 27, 31, 32 n.25, Respondents seek to ground jurisdiction on the *reasons* for the acts. This Court in *Weltover* rejected such a theory in unequivocal terms: "However difficult it may be in some cases to separate 'purpose' (*i.e.*, the *reason* why the foreign state engages in the activity) from 'nature' (*i.e.*, the outward form of the conduct that the sovereign state performs or agrees to perform), the statute unmistakably commands that to be done." 112 S. Ct. at 2167 (emphasis in original) (citation omitted); *see id.* ("[I]t is irrelevant *why* Argentina participated in the bond market . . . .") (emphasis in original). Even if the "reason why" Respondent was arrested and imprisoned was to discipline him or retaliate against him, the "outward form of the conduct"—arrest and imprisonment by government officials acting under color of law—was sovereign, and therefore is immune from suit.[12] Not surprisingly, Respondents have not identified a single case in which any U.S. court has found jurisdiction under the "commercial activity" exception to decide claims based upon a foreign sovereign's exercise of police powers within its own borders.

Finally, Respondents' effort to distinguish between "the Hospital and Saudi Arabia as Owner" on the one hand and Saudi Arabia as "police department" and sovereign on the other hand, with the result that "the Hospital and its Owner" by definition can only engage in commercial acts and therefore cannot invoke sovereign immunity, is wholly unfounded. A plaintiff may not circumvent the FSIA's grant of immunity for sovereign

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ent was arrested would be tantamount to a trial on the merits and would "frustrate the significance and benefit of entitlement to immunity from suit." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990) (citation omitted).

[12] The unlimited breadth of Respondents' proposed theory of the "commercial activity" exception is further illustrated by their assertion that even if Respondent was arrested and imprisoned for committing forgery, jurisdiction would nonetheless exist because such forgery was "bound up with" the Hospital's employment practices. Resp. Br. 31 n.24.

law enforcement conduct merely by alleging the involvement of some governmental employees or entities in addition to the "police department" or other government ministry that most directly exercises the powers in question. Respondents completely miss the point in suggesting that "there is no basis for concluding that the Saudi Government divested the Hospital, itself an inherently commercial enterprise, of its normal character and thereby cloaked it with the immunity of a police department." Resp. Br. 32. The Hospital does not need to "derive" or be "cloaked with" immunity from elsewhere. It is a "foreign sovereign" in its own right under the FSIA and is immune from any suit challenging its conduct of a governmental nature.[13] The claims against the Hospital are based on its alleged participation in the arrest and imprisonment of Respondent under color of Saudi law. Whether Hospital officials acted lawfully in exercising such powers is the *merits* issue; the dispositive *jurisdictional* issue turns on the fact that the Hospital's conduct at issue was of a uniquely governmental nature rather than conduct "but which [a] private party engages in "trade and traffic or commerce.'" *Weltover*, 112 S. Ct. at 2160.

Indeed, Respondents themselves contend that Saudi Arabia is the Hospital's "alter ego" and that "for all purposes relevant to the . . . disposition of Petitioners' motion to dismiss, the Hospital and its Owner [Saudi Arabia] are one and the same." Resp. Br. 17. Thus, under Respondents' own theory of the case, every partici-

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[13] Respondents' reliance on *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), *see* Resp. Br. 31, is misplaced. The *Callejo* court, explaining the earlier decision in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), stated that the state-owned airline in *Arango*, which was charged with battery and false imprisonment, "acquired immunity not derivatively from the government's sovereign acts, but only by participating directly in those acts—that is, by acting as a sovereign itself." 764 F.2d at 1109-10. Similarly, if the Hospital participated in Respondent's arrest and imprisonment under color of law, such conduct would not require "derivative immunity," but would be immune in its own right because the Hospital was "acting as a sovereign itself."

pant allegedly responsible for Respondents' injuries, whether associated with the Hospital or another entity, was under the direction and control of Saudi Arabia. It therefore is especially untenable for Respondents to purport to distinguish "the Hospital and Saudi Arabia as Owner" from Saudi Arabia as sovereign.[14] Respondents allege that the government of Saudi Arabia, acting through various employees, agents and entities, injured Respondent through wrongful arrest, imprisonment, and mistreatment in prison. All of Petitioners are entitled to immunity because their alleged conduct was plainly not commercial in nature.

C. Respondents' Negligence Claims Are Not "Based Upon Commercial Activity"

Respondents concede that their "duty to warn" negligence claims turn on the propriety of Saudi law enforcement conduct which is "sovereign in nature." *See* Resp. Br. 33 n.27, 40 (noting "Petitioners' understandable concern" that the "duty to warn" claims would require "'an expansive inquiry into police practices of Saudi Arabia'"). For this very reason, Respondents' attempt to plead around Petitioners' immunity, by alleging that

[14] In an ironic twist on their former "nexus" theory, Respondents now contend that "[t]he alleged law enforcement 'nexus' does not divest the Hospital's activities of their commercial nature," Resp. Br. 30, and indeed that the Saudi law enforcement officials involved must have "taken on the commercial character" of the Hospital, *id.* 34 n.28. Neither of the cases Respondents principally rely on, *id.* 31-32, supports such an extraordinary proposition. In *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990), the court noted "that Foremost's complaint alleges actions that are both commercial and governmental in nature," and reiterated that "when a 'transaction partakes of both commercial and sovereign elements,' 'jurisdiction will not obtain if the cause of action is based on a sovereign activity.'" *Id.* at 450 (citing *Millen*, 855 F.2d at 885). Similarly, in *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992), the court held only that where the specific act complained of (breach of contract) was commercial, the foreign state's alleged sovereign motivation for that act was irrelevant—precisely the analysis advocated by Petitioners. Pet. Br. 22-23.

Petitioners should have warned Respondents of the alleged abuse of the police power in Saudi Arabia, cannot be permitted because it would eviscerate the FSIA's intended immunity for a foreign sovereign's public acts within its own borders. *See* Pet. Br. 36-38.

In *United States v. Shearer*, 473 U.S. 52 (1985), this Court rejected a similar attempt by a plaintiff to circumvent the United States' immunity under the Federal Tort Claims Act (FTCA) by pleading a breach of a duty to warn. Pet. Br. 37-38. Respondents' effort to distinguish *Shearer* because it "did not involve an independent duty as exists here," Resp. Br. 39 n.34, is misplaced. *Shearer* did not turn on the existence of an independent duty to warn,[15] but on the fact that the plaintiff's claims necessarily challenged conduct—"deliberate attacks by Government employees"—for which the government was immune under the FTCA. 473 U.S. at 55.[16] As in *Shearer*, Respondents' factual allegations would require U.S. courts to enter into a line of inquiry that is impermissible under

[15] Respondents' reliance on *Doe v. United States*, 838 F.2d 220, 222 (7th Cir. 1988), and *Kearney v. United States*, 815 F.2d 535, 537 (9th Cir. 1987), as standing for the proposition that Petitioners owed an independent duty to Respondent, is misplaced. Neither case involved a duty to warn. Rather, both cases involved entirely different situations where the government assumed an affirmative duty to protect the plaintiff (child care and prison, respectively) which had been breached by negligent supervision of the children and prisoners. *See also* Pet. Br. 38 n.22.

[16] Respondents' effort to distinguish *Shearer* because Section 2680(h) of the FTCA is broader than Section 1605(a)(2) of the FSIA, *see* Resp. Br. 39 n.34, ignores the different context of these provisions. Because Section 2680(h) is an exception to the FTCA's general waiver of immunity, it sets out specific circumstances, claims of assault and battery, to which the waiver does not extend. Section 1605(a)(2), on the other hand, performs the opposite function by specifying those instances in which a plaintiff may bring suit, regardless of the FSIA's grant of immunity to foreign states. Thus, because the purposes of these two sections are diametrically opposed, Respondents' argument that Section 2680(h) is more sweeping than Section 1605(a)(2) is simply wrong.

the FSIA.[17] Because Respondents' "duty to warn" claims require proof of the alleged unlawful governmental acts of Saudi officials within Saudi borders, and further would entail an even broader inquiry into the propriety of the Saudi law enforcement system in general, *see* Pet. Br. 38, these claims are clearly based upon sovereign activity and therefore are immune from suit under Section 1605(a)(2).

D. Respondents' "Public Policy" Arguments Are Properly Addressed To Congress, Not To This Court

Respondents request this Court to find jurisdiction on "public policy" grounds, on a theory that an exception to sovereign immunity under the FSIA should be recognized for foreign state conduct which is "plainly unlawful and especially repugnant" or, alternatively, where alleged "human rights abuses [are] carried out by governments in a business context." Resp. Br. 35; *see also* Brief of International Human Rights Law Group, *et al.* 48. Such a theory has no basis in the statutory language or purposes,[18] and would make sovereign immunity a mirage by allowing the plaintiff's mere allegations of unlawful conduct to serve as the very basis for jurisdiction. Moreover, as Respondents concede, Resp. Br. 36 n.30, their "public policy" exception to immunity would contravene *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which held that sovereign immunity "is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions." *Id.* at 436. Respondents' public policy arguments have no place in the interpretation of the FSIA, but should be directed to Congress.

[17] Plaintiff's suit was also barred by *Feres v. United States*, 340 U.S. 135 (1950), because it would require an impermissible inquiry into military affairs. *Shearer*, 473 U.S. at 59.

[18] Indeed, such an "exception" would undermine Congress's key objective of avoiding the adverse consequences to U.S. foreign relations that could result from U.S. court adjudication of a foreign state's public acts. *See* Pet. Br. 31-34. The United States has expressed its serious concern that Respondents' proposed expansive interpretation of the FSIA would make it "difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities." J.A. 121-22; *accord* Pet. Br. 34-35. Contrary to Respondents' assertion that "the U.S. Government asserts no such [foreign policy] interest in its submission to this Court," Resp. Br. 36 n.32, the United States explained in supporting the petition for writ of certiorari that the importance of properly applying the FSIA "is heightened in cases, as here, where the lawsuit implicates the foreign state's exercise of law enforcement activity within its own borders." Brief for the United States as *Amicus Curiae* 8.

II. RESPONDENTS' CLAIMS HAVE INSUFFICIENT CONTACT WITH THE UNITED STATES TO SUPPORT JURISDICTION UNDER SECTION 1605(A)(2)

Even if Respondents could establish that their suit is based upon commercial activity to the extent it relates to Respondent's employment in Saudi Arabia, they have failed to show that such activity was "carried on in the United States," 28 U.S.C. § 1605(a)(2), *i.e.*, had "substantial contact with the United States." *Id.* § 1603(e). Respondents do not dispute that "the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based," *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991), or that the connection with the United States must be "material." Resp. Br. 43. This "substantial contact" requirement is not satisfied here because all pertinent activities took place in Saudi Arabia.[19]

Respondents themselves state that "[t]he gravamen or theory of the complaint relates [Respondent's] injuries to wrongful retaliation taken against [Respondent] for his *job performance*." *Id.* (emphasis added). Respondents contend that they were injured *wholly* in Saudi

[19] Respondents contend that "the United States suggests that clause 1 restricts jurisdiction to cases in which the commercial activities providing the basis for the claim, occur in this country," Resp. Br. 41, but the United States has taken the contrary position. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 18 n.13.

Arabia, as a result of arrest, imprisonment, and torture of Respondent *wholly* in Saudi Arabia, for reporting an unsafe condition at a hospital that employed him *wholly* in Saudi Arabia. Thus, even accepting Respondents' notion that these are "commercial" activities upon which this lawsuit is based, Respondents' tort claims do not require proof of any act that occurred in the United States. The incidental contacts with the United States involving the recruitment and hiring of Respondent have no legal or factual relevance to these claims.[20]

Rather than emphasize the specific facts relating to Respondent's employment and alleged injuries in Saudi Arabia, Respondents focus instead on the overall "recruiting activities" of Hospital Corporation of America (HCA) in the United States. Respondents try to depict the Hospital as "critically dependent upon" and indeed "ow[ing] its very existence to," the "ongoing [recruitment] program" in the United States allegedly "sustained for more than a decade" by HCA. Resp. Br. 4, 43-44. Such assertions not only are unsupported,[21] but also are irrelevant to the jurisdictional inquiry. By focusing on alleged generalized recruiting activity in the

[20] Even if Respondents' claims were somehow deemed to be based upon his recruitment and hiring, such activities were not "carried on in the United States." Respondents dwell on the allegation that Respondent saw a KFSH job advertisement while in the United States, without acknowledging that he initially traveled to Saudi Arabia not because of any such "recruitment" by Petitioners, but because he was hired by another United States company to work in Saudi Arabia. Pet. Br. 3. Although conceding that Respondent "interviewed for the job in Saudi Arabia," Resp. Br. 5, Respondents omit to add that he both was offered the position and decided to take it *while still in Saudi Arabia*, before he "returned to the United States to complete the processing requirements (visas, medical exam, etc.)" for the job. J.A. 57. They also avoid mentioning that the employment contract did not become effective until Respondent commenced his employment in Saudi Arabia in December 1983. J.A. 40.

[21] Respondents merely cite to the existence of a contract between HCA and Saudi Arabia and to the acts in 1983 that allegedly relate to the recruitment of Respondent. Resp. Br. 43-44.

United States, and not upon the specific activities on which *this case* is allegedly based, Respondents essentially ask this Court to adopt a "doing business" test to satisfy the "substantial contact" requirement. The statute, legislative history, and case law all make clear, however, that the "substantial contact" standard requires more than the due process requirement of minimum contacts. Pet. Br. 40-41.

Finally, Respondents argue that their "duty to warn" claims have a substantial connection to the United States because the Hospital's alleged duty to warn arose "before [Respondent] signed his contract" or, alternatively, when Respondent became "obligated under that agreement." Resp. Br. 47. This contention ignores the fact that Respondent interviewed for and decided to take the job in Saudi Arabia, and that his employment obligations did not commence until he began working for the Hospital in Saudi Arabia.[22] As with the other potentially relevant activity, Saudi Arabia is the locus of any alleged omission.[23] Pet. Br. 44-45. Accordingly, the negligence claims also lack "substantial contact" with the United States.

[22] Respondents rely upon a hornbook citation for the proposition that "common law duties arise at [the] creation of [a] master/servant relationship." Resp. Br. 47 n.46. Despite the fact that this citation refers to when—not where—a duty may have arisen, by Respondents' own theory that duty could have arisen only after Respondent commenced his employment in Saudi Arabia in December 1983. J.A. 4, 40.

[23] Saudi Arabia has repeatedly made clear to Respondents that it is prepared to assist them and their counsel to invoke its administrative and/or legal processes as well as its laws and directives against any mistreatment while in police custody. Pet. Br. 7.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the judgment of the court of appeals should be reversed and Respondents' actions should be dismissed.

Respectfully submitted,

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No. 91-522

In the

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, *et al.*,

Petitioners,

v.

SCOTT NELSON, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC OF THE YALE LAW SCHOOL, AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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No. 91-522

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SAUDI ARABIA, et al.,
Petitioners,

v.

SCOTT NELSON, et al.,
Respondents.

MOTION OF INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC OF THE YALE LAW SCHOOL, AND THE CENTER FOR CONSTITUTIONAL RIGHTS FOR LEAVE TO FILE BRIEF

The International Human Rights Law Group, the Minnesota Lawyers International Human Rights Committee, the Allard K. Lowenstein International Human Rights Clinic of the Yale Law School, and the Center for Consitutional Rights move, pursuant to Rule 37.4 of the Court's rules, for leave to file the attached

amici curiae brief in support of Respondents. Respondents have consented to the filing of the attached brief and have filed a letter to that effect with the Clerk of the Court. Petitioners have declined consent.

Amici believe that the attached brief would be of substantial assistance to the Court in resolving the question presented. The attached amici curiae brief addresses issues that are not being addressed to the same extent by the parties or the other amici. It suggests a reading of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 et seq., that differs substantially from the interpretations suggested by Petitioners or the United States as amicus curiae. It also addresses some of the statutory issues in more detail and from a broader perspective than Respondents' brief.

In addition, the Minnesota Lawyers International Human Rights Committee is in a position to make a unique contribution to this proceeding because it recently completed a two year study on the employment of American citizens in Saudi Arabia and the disputes that arise in that employment context. The results of that study provide further support for amici's reading of the FSIA by documenting the serious policy consequences of granting Petitioners immunity under the circumstances of this case.

For these reasons, and the reasons stated in the Statement of Interest in the accompanying brief, amici request leave to file the accompanying brief.

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No. 91-522

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Respondents.

BRIEF FOR THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC OF THE YALE LAW SCHOOL, AND THE CENTER FOR CONSITUTIONAL RIGHTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The International Human Rights Law Group (the "Law Group"), the Minnesota Lawyers International Human Rights Committee (the "Minnesota Lawyers Committee"), the Allard K. Lowenstein International Human Rights Clinic of the Yale Law School

(the "Lowenstein Clinic"), and the Center for Constitutional Rights (the "Center") submit this brief pursuant to Rule 37 of the Court's rules to assist the Court in determining the jurisdiction of the United States courts under the "commercial exception" to sovereign immunity of the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. § 1602(a)(2).[1] For the reasons stated herein, this Court should find that the FSIA applies in this case to authorize this lawsuit against a foreign sovereign because the actions complained of here

[1] Because Respondents have alleged jurisdiction solely on the basis of 28 U.S.C. § 1602(a)(2), the parties and amici have limited the focus of their arguments to that provision. A finding that the United States courts lack jurisdiction under 28 U.S.C. § 1602(a)(2), however, would not necessarily mean that jurisdiction over the type of claims brought here could not be established under any other law. The Court need not, and should not, decide that question.

were part of a course of commercial conduct that had a substantial contact with the United States.

STATEMENT OF INTEREST OF AMICI CURIAE

The Law Group is a nonprofit legal organization that seeks to promote respect for international human rights. Founded in 1978, it provides legal assistance and information in the field of international human rights law and has consultative status with the United Nations Economic and Social Council.

The Minnesota Lawyers Committee was founded in 1983. It also is a nonprofit organization of lawyers committed to the promotion and protection of human rights worldwide, including the right to be free from abduction, disappearance, and arbitrary arrest.

The Lowenstein Clinic was organized in 1991 at the Yale Law School as a

faculty-supervised course under the auspices of the Allard K. Lowenstein International Human Rights Project, a ten-year old student-run organization that seeks to educate and inspire law students, scholars, practicing attorneys, and policymakers in defense of international human rights.

The Center is a tax-exempt litigation organization devoted to enforcing the United States Bill of Rights and the International Bill of Rights. The Center has a particular interest in enforcing the norms of international human rights in the United States courts.

Together and individually, amici offer their expertise on a pro bono basis to individuals and groups concerned with enforcing the observance of human rights. In the United States courts, amici have participated in many cases involving

claims of torture and the enforcement of other international human rights. Because some of those cases are still on-going, the Court's disposition of this case is of great interest to amici and their clients.

SUMMARY OF ARGUMENT

In this case, a hospital owned by a foreign sovereign came to the United States to recruit employees, entered into employment contracts within the United States' borders with American citizens, and engaged in a continuous and systematic course of other hospital business in this country, including the purchase of hospital supplies. The question presented here is whether this hospital can escape accountability in a United States court for causing an American employee to be "beaten, shackled and tortured" in connection with his job performance simply because the specific tortuous conduct complained

of occurred abroad.[2] The answer to that question, as a matter of law and policy, should be a resounding no.

While the United States, as amicus curiae, reluctantly acknowledges that a relatively innocuous failure to pay wages by the hospital would be subject to the full jurisdiction and remedial authority of the United States courts,[3] it nevertheless joins Petitioners in contending that the American judicial system is powerless to provide redress for the far more serious and disabling injuries inflicted

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2 Since this case arrived here on a motion to dismiss, the allegations in the complaint must be accepted as true. E.g., United States v. Gaubert, 111 S. Ct. 1267, 1276 (1991). Thus, the facts recited in this amici curiae brief are taken from Respondents' complaint.

3 See Brief for United States as Amicus Curiae Supporting Petitioners ("U.S. Brief") at 18-19 n.13.

here. That position cannot be supported, however, by the plain language or legislative history of the FSIA's commercial exception to sovereign immunity.

The commercial exception to sovereign immunity applies where a foreign state engages in a course of commercial conduct that has a substantial contact with the United States. The activity at issue here, including the specific acts that resulted in Respondent Scott Nelson's torture, was part of a course of commercial conduct within the meaning of that provision. While it may shock the conscience that a routine employment dispute such as that alleged here was dealt with by brute force, it was, nonetheless, force employed in a commercial, not a governmental, context. That Petitioners enlisted the aid of the Saudi police to apply that

force does not take it out of the commercial exception to sovereign immunity.

Petitioners' course of conduct also had a substantial contact with the United States. The structure and legislative history of the FSIA demonstrate that the substantial contact test embodies the court's landmark rulings applying the due process clause of the United States Constitution in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220 (1957). Petitioners' contacts with the United States meet that test. By actively recruiting and contracting with Respondent and other hospital employees in the United States, Petitioners purposefully availed themselves of the privileges of doing business here. That is all that the substantial contact test requires for jurisdiction -- whether the claims assert-

ed sound in contract or in tort. The efforts of Petitioners and the United States to avoid this result by proposing what would amount to a special immunity for torts committed abroad in a commercial context have no support in either the statute or in logic.

There are no countervailing interests that would justify a decision not to assert the undoubted power of the United States courts to redress wrongs like those alleged here. Rather, denying access to the United States courts in cases involving the use of torture in a commercial setting would effectively encourage foreign sovereigns that place little value on human rights to resort to violence to settle their employment and other commercial disputes. And such a denial would do so in violation of the United States' strong policy against al-

lowing torturers to evade liability for their actions. Thus, the decision of the Court of Appeals finding jurisdiction over Petitioners in this case should be affirmed.

ARGUMENT

The FSIA provides that the district courts shall have jurisdiction over claims brought against a foreign state where the foreign state is not entitled to immunity. 28 U.S.C. § 1330(a) (1988). The FSIA's "commercial exception" to sovereign immunity further provides in pertinent part:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .

Id. § 1605(a)(2). The claims brought by Respondents meet these requirements and therefore can be raised in a United States court.

A. Respondents' Claims Are "Based Upon Commercial Activity" Within the Meaning of the FSIA.

Petitioners argue that the physical assault of an employee, by its nature, can never be part of a course of commercial conduct within the meaning of the FSIA, especially when the assault is carried out by police officials. As discussed further in Subpart C below, the public policy implications of adopting that position could be dramatic. Moreover, the statute plainly encompasses all acts, including acts of violence, that are part of a course of commercial conduct. Petitioners' acts meet that test.

1. A Claim Is "Based Upon Commercial Activity" if the Challenged Act Is Part of a "Regular Course of Commercial Conduct."

The FSIA defines "commercial activity" to mean:

> [E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d) (1988).

These provisions plainly establish that the commercial exception applies where the action is based upon a regular course of commercial conduct. However, the Court has noted that the statute "leaves the critical term 'commercial' largely undefined." Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2165 (1992).

This statutory ambiguity is removed by the legislative history of the FSIA and this Court's precedents, which make clear that Congress intended the commercial exception to codify the so-called "restrictive" theory of sovereign

immunity, which restricts immunity to suits involving a foreign state's public acts and does not extend to suits based on commercial or private acts. Id.; see also Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-89 (1983). Thus, "[t]he meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." Weltover, 112 S. Ct. at 2165.

Applying that standard, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." Id. at 2166. Because the FSIA provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question "is not

whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." Id. Rather, the issue is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" Id. (emphasis in original). See also Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976) (a foreign state is engaged in "commercial" activity when it "do[es] not exercise powers peculiar to sovereigns" but rather "exercise[s] only those powers that can also be exercised by private citizens").

The legislative history further indicates that Congress intended the phrase "commercial activity" to "includ[e] a broad spectrum of endeavor, from an

individual commercial transaction or act to a regular course of commercial conduct." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614 ("H.R. Rep. No. 94-1487"). While Congress avoided "an excessively precise definition of this term," the House Report that accompanied the FSIA specifically noted that "a foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of 'commercial activity']." Id., reprinted at 6615. Significantly, the House Report further states that commercial activity would include "the wrongful discharge . . . of an employee of the foreign state . . . ." Id. at 19, reprinted at 6617.

2. Respondents' Claims Are Based upon Commercial Activity

The conduct giving rise to Respondents' causes of action constituted a "regular course of commercial conduct." Petitioners systematically recruited and hired foreign nationals, including United States residents, to work at the King Faisal Specialist Hospital (the "Hospital") in Riyadh, Saudi Arabia. The contract between the Hospital and its agent, Hospital Corporation of America ("HCA"), specifically authorized HCA to "recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust either salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel." Joint Appendix ("J.A.") at 73.

The contract further provided that "employment contracts will be between [the Hospital] and the employee, but may be executed for [the Hospital] by HCA as agent." Id. at 72.

Accordingly, HCA, acting as an agent of the Hospital, recruited Respondent Scott Nelson in the United States to fill the position of monitoring systems engineer at the Hospital. Id. at 4, ¶ 6. Mr. Nelson's employment agreement with Saudi Arabia was executed in Miami. See id. at 4, ¶ 7. In addition, Saudi agents provided Mr. Nelson with an insurance policy for major medical benefits and discussed his employment duties and responsibilities at an orientation program held in Nashville, Tennessee. See id. at 4, ¶ 7.

Pursuant to the employment contract executed in the United States, Mr.

Nelson moved to Saudi Arabia and undertook various job-related responsibilities, including inspecting and monitoring all hospital facilities, equipment, utilities and maintenance systems to ensure the safety of patients, hospital staff, and others. See J.A. at 4, ¶ 6. He reported safety concerns to his supervisors and otherwise endeavored to ensure the safety of Hospital patients, all in accordance with the job description that had been provided to him in the United States by HCA and further elaborated during discussions he had with HCA before leaving for Saudi Arabia.

There is no dispute in this case that Petitioners' recruitment, hiring and employment of Respondent at the Hospital, and the operation of the Hospital itself, were typical of activities commonly engaged in by private businesses and thus

were commercial activities. The principal area of dispute in this case is whether the specific acts in Saudi Arabia of which Respondents complain -- causing Respondent to be imprisoned, beaten, and tortured -- were part of that course of commercial conduct within the meaning of the FSIA.

Under the facts alleged in this case, they were. The complaint maintains that Mr. Nelson was imprisoned and beaten because of his insistence in reporting safety violations.[4] Retaliation against a

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[4] On this point, Petitioners contend that Respondent was imprisoned and tortured because he submitted false information on his employment application, a violation of Saudi law. In other words, they claim that the torture was part of routine law enforcement, a purely sovereign activity. However, as noted above, since the issues in this case were raised in connection with a motion to dismiss, these assertions must be ignored and Respondents' allegation that the brutality was solely a reaction to Mr. Nelson's employment performance must be accepted as true.

(Footnote continued)

"whistleblower," by whatever means, is an employer's response to employee conduct. It occurs in the context of work-related disputes and is committed by employers acting as participants, not regulators, in the marketplace. It can be carried out by public and private employers alike. There can be no dispute that when an employer disciplines a whistleblower with a reprimand, suspension, warning, termination, reduction in wages, or some other method, it is the type of employment activity that

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(Footnote 4 continued from previous page)
Even if evidence supporting Respondents' allegation were necessary, it is found in the fact that, as Respondents point out in their brief, Mr. Nelson was never charged with any violation of law or provided any legal process. See Brief for Respondents at 9-10 nn.8-10. Moreover, as discussed below, it is quite commonplace among private employers in Saudi Arabia to threaten, detain and physically assault their employees in precisely the manner alleged here.

the House Report accompanying the FSIA specifically characterized as commercial. It becomes no less commercial merely because the employer eschews these conventional responses to employee behavior and employs violence instead as a means to impose discipline.

The fact that the Hospital enlisted the assistance of the Saudi police also does not alter the commercial nature of the activity. This Court has recognized that a sovereign actor who becomes a partner with any commercial actor does not "communicat[e] to the company its privileges and its prerogatives . . . ."[5] See

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[5] Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824). This case was cited in the hearings on the FSIA. See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 30
(Footnote continued)

also, cf., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990) (exercising jurisdiction over a private commercial actor that had acted in concert with a foreign sovereign). That should be particularly so where torture is involved, because torture, by its nature, is so heinous an act that it generally is not recognized as sovereign activity. See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (suggesting that, in light of universal condemnation of torture, it cannot be a sovereign act for purposes of the act of the state doctrine).

Here, the Hospital was apparently able to enlist the services of the police force because the Hospital was run

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(Footnote 5 continued from previous page)
(1976) (testimony of Bruno Ristau, Chief, Foreign Litigation Section, Department of Justice).

by the government. But whether the force is applied by the local police or a group of hired thugs should not matter for jurisdictional purposes, as long as they were utilized to further the employer's commercial activity. Here the complaint alleges that they were, and that is all that should be required to survive a motion to dismiss.

B. Respondents' Lawsuit Is Based upon a Commercial Activity "Carried on in the United States"

Petitioners and the United States argue that where a tort occurs in a course of commercial activity, the Court should assert its authority only where the tort, or at least the "gravamen" of the complaint, occurs entirely within the United States' borders. As discussed in Subpart C below, that standard would require the Court to make an arbitrary distinction between actions sounding in con-

tract and in tort, with the result of actually encouraging tortuous activity against foreign employees. Moreover, the standard proposed by Petitioners and the United States has no support in the statute, which simply requires that the challenged activity have a "substantial contact" with the United States. Properly understood, the commercial exception clearly applies here.

1. Commercial Activity Is Carried on in the United States If It Is Part of a Course of Commercial Conduct That Has a Substantial Contact With the United States.

As noted above, 28 U.S.C. § 1605(a)(2) provides an exception to sovereign immunity for actions "based upon a commercial activity carried on in the United States by the foreign state . . . ." A commercial activity "carried on in the United States by a foreign

state" is defined as commercial activity "carried on by such state and having substantial contact with the United States." Id. § 1603(e) (emphasis added). And "commercial activity" includes "a regular course of commercial conduct . . . " Id. § 1603(d).

The level of contact necessary to meet the "substantial contact" test is found in this Court's precedents for determining whether a court can exercise personal jurisdiction over a foreign defendant.[6] Read together, 28 U.S.C. § 1330 and 28 U.S.C. § 1605-1607 make clear that the substantial contact test was intended

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[6] For a lower court opinion that persuasively makes a similar argument, see Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 206-07 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part).

to embody the due process requirements for the exercise of personal jurisdiction as they existed at the time the FSIA was enacted in 1976.

In particular, 28 U.S.C. § 1330 provides, inter alia, that subject matter and personal jurisdiction exist under the FSIA in any case in which the foreign state is not entitled to immunity. Each of the immunity provisions, in turn, requires some level of contact with the United States. See id. § 1605-1607. The Senate report accompanying the FSIA thus explained that "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied in [28 U.S.C. § 1330]." S. Rep. No. 1310, 94th Cong., 2d Sess. 13 (1976). In explanation, the Report cited to this Court's landmark decisions in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee

v. International Life Insurance Co., 355 U.S. 220 (1957).

The court's decisions in International Shoe and McGee establish due process requirements that, not coincidentally, are precisely tracked in the commercial exception to the FSIA. In particular, the minimum contacts with the forum state necessary to satisfy due process can be established where the defendant is "doing business" within the forum, commits the challenged act within the forum, or causes a direct effect within the forum. International Shoe, 326 U.S. at 317-19; McGee, 355 U.S. at 223. These same three criteria were adopted by Congress when it enacted 28 U.S.C. § 1605(a)(2), for it establishes jurisdiction over a foreign sovereign for a course of commercial conduct that either has a substantial contact with the United States, occurs entirely

inside the United States, or causes a direct effect within the United States. See 28 U.S.C. § 1605(a)(2) (1988). The "doing business" test, which establishes personal jurisdiction "in instances in which the continuous corporate operations within the state [are] thought so substantial and of such a nature as to justify suits against it . . . ,"[7] corresponds to the "substantial contact" test of the FSIA.

The legislative history and the structure of the statute thus make clear that the FSIA's substantial contact test is satisfied where a foreign company is "doing business" in the United States

[7] International Shoe, 326 U.S. at 318. See also McGee, 355 U.S. at 223 ("It is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State").

within the meaning of the Court's precedents applying the due process clause. The Court of Appeals in effect adopted this approach with its "nexus" test. The court concluded that as long as there is a relationship or a connection between the commercial activity complained of and that part of the commercial activity that occurred in the United States, jurisdiction exists. Although stated differently, that approach is consistent with Congress' intent to embody into § 1605(a)(2) a test for jurisdiction that mirrors the due process requirements laid out by this Court in International Shoe and McGee.

The doing business test is satisfied where a foreign state "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S.

235, 253 (1958). The Court elaborated on this standard in Burger King Corp. v. Rudewicz, 471 U.S. 462 (1985), explaining:

> Thus, where a defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 475-76 (citations omitted).

Under that test, the courts of the United States or a state have jurisdiction over employment suits against an employer who recruits an employee in the forum but employs him and engages in actionable conduct elsewhere. Cf. Alaska

Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).[8]

2. The Course of Commercial Conduct upon Which Respondents' Claims Are Based Had a Substantial Contact with the United States.

Petitioners' contacts with the United States were more than enough to meet the "doing business" or "substantial contact" test. Petitioners deliberately

[8] In that case, the court upheld a ruling of the California Accident Commission applying a California workman's compensation scheme to an employee who entered into an employment contract in California, but was employed and injured in Alaska. Although Alaska Packers Association was decided before International Shoe or McGee, it is fully consistent with the due process clause of the United States Constitution as subsequently construed by the Court and remains the law today. See also Onderik v. Morgan, 897 F.2d 204 (6th Cir. 1989) (government employees who caused plaintiffs to be wrongfully discharged in Indiana could be sued in Michigan).

engaged in significant activities within the United States. Apparently because of the large number of skilled hospital workers in this country, the Hospital and its agents implemented a systematic program for recruitment and employment of hospital personnel here. Petitioners advertised for employees here. Their employment contracts, including that with Respondent, were signed here. They conducted "orientation" sessions here, and they kept an office in the United States through which recruited employees could maintain contact with friends and relatives in the United States.

The employment contracts Petitioners entered into created continuing obligations between Petitioners and citizens of the United States and manifested a purposeful availment of the privilege of conducting business in this country. Pe-

titioners undoubtedly could have brought suit in the United States courts to enforce the employment and other contracts they entered into in the United States with the full benefits and protections of our laws and judicial procedures. Thus, it is presumptively reasonable to require Petitioners to submit to litigation here.

3. Petitioners and the United States Are Wrong in Contending That the Particular Act That Is Challenged, or at Least the "Gravamen" of the Complaint, Must Occur Within the United States' Borders.

Petitioners and the United States ignore traditional "substantial contacts" analysis and instead try to give an overly strict construction to the language of the statute itself. They argue that an action is based upon a course of commercial conduct that has a substantial contact with the United States only if the particular act complained about, or at

least the "gravamen" of the complaint, occurred entirely within the United States' borders. In so doing, petitioners and the United States focus on the words "based upon" in 28 U.S.C. § 1605(a)(2). Taken literally, they say, the commercial activity complained of must itself have occurred in the United States.

By focusing on the literal words of 28 U.S.C. § 1605(b)(2) without the benefit of the definitions provided by 28 U.S.C. § 1603, Petitioners and the United States reach the wrong conclusions. As discussed above, when clause 1 of § 1605(a)(2) is read together with the definitions provided by 28 U.S.C. § 1603, it becomes clear that the activity complained of need only be part of a "course of commercial conduct" that has a "substantial contact" with the United States. Once these requirements are established,

as is clearly the case here, the jurisdictional requirement of clause 1 is met.

Had Congress intended to limit the scope of clause 1 to acts committed within the United States' borders, Congress would have made that intent express, as it did in clause 2, which applies to "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2) (1988). Moreover, the construction of the statute urged by Petitioners and the United States would make clause 1 virtually meaningless by limiting its scope to acts that would otherwise be actionable in any event under clause 2 or under 28 U.S.C. § 1605(a)(5), which applies to all torts, including non-commercial torts, that cause personal injury or other damage in the United

States and are not otherwise encompassed by the commercial exception.

Further, the interpretation proposed by Petitioners and the United States is inconsistent with the legislative history of the Act. H.R. Rep. No. 94-1487 states:

> As paragraph (d) of Section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States.

H.R. Rep. No. 94-1487 at 16, reprinted at 6615.

Finally, the strict construction of the FSIA proposed by Petitioner and the United States takes them further than the United States, at least, really wants to go. Their "literal" reading would deny access to United States courts in cases

where it was clear that Congress intended otherwise. For example, their strict construction would bar a lawsuit by an employee recruited in the United States who was not paid by his employer abroad. The same would be true for contracts entered into in the United States to sell goods abroad. Under Petitioners' test, if the payment were to be made abroad, there would be no jurisdiction. Petitioners' crabbed view of clause 1 would require jurisdiction to depend on such fine distinctions as whether the employee or seller of goods specified that payment had to be made to a bank account or address in the United States. It is clear from the language of the statute and its legislative history, however, that Congress did not intend for jurisdiction to turn on such narrow formalisms.

4. There Is No Basis for Distinguishing Between Actions Sounding in Tort and Contract.

Apparently aware that a literal interpretation of clause 1 yields a conclusion that is unsupportable in logic or legislative history, the United States tries to extricate itself from this trap by arguing that the Court should distinguish between actions sounding in contract and those sounding in tort. Under the standard the United States proposes, breaches of contract occurring outside the United States' borders would be actionable under clause 1. See U.S. Brief at 18-19 n.13. In contrast, for a tort to be actionable under that same provision, the "gravamen" of the complaint would have to occur entirely within the United States' borders. Id. at 22-23.

This effort to distinguish between torts and contracts is particularly

ironic given that the same advocates of strict construction attempt to blunt the harsh effect of that construction by resorting to a distinction that has no support in the language of the statute. As noted above, under this distinction, a foreign state that breached elsewhere the terms of an employment contract entered into in the United States -- by, for example, refusing to pay wages -- apparently could be called to account in the United States courts. But a foreign state that used far more egregious methods to enforce its employment policies -- such as by the assault, torture or false imprisonment alleged here -- would not. Both types of actions are integral to a commercial relationship, however, and there is no basis for holding that the first type of claim is jurisdictional and the latter is not.

Under modern jurisprudence, business relationships are governed by both contract and tort law. Lawsuits between private parties over commercial disputes today more often than not contain multiple claims sounding in both tort and contract. For example, in addition to a routine breach of contract claim, it is not unusual to see claims for breach of some common law duty of care or trust, claims for interference with advantageous contractual relationships and the like. Under the contract/tort distinction urged by the United States, all but contract actions would be barred unless the plaintiff could demonstrate that the tort occurred in the United States. No such distinction is apparent from the statute and it is not evident in the legislative history. It is not a distinction that applies to litigation between private

parties.[9] It should not be a distinction engrafted onto the FSIA.

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[9] There is no question that a court can exercise personal jurisdiction over a defendant that is doing business in the forum state in a case involving a tort that occurred outside the forum. That proposition is so self-evident that the Court generally has focused on whether a tortfeasor can be sued in the place where the tort or damage occurred -- not whether the suit must be brought there. E.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (holding that a regional distributor and dealer that did business in New York could not be sued in Oklahoma on product liability claims). Lower court decisions, however, have addressed the issue directly and recognized that the due process clause does not require that an action in tort be brought in the place where the tort or damage causing activity occurred. E.g., Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367, 1371 (5th Cir. 1986) (due process clause did not preclude Louisiana court from asserting jurisdiction in case involving accident that occurred outside of Louisiana).

C. Public Policy Favors Strongly Jurisdiction over Cases Like This One.

As noted above, under the "substantial contact" test, it is presumptively reasonable to require Petitioners to submit to jurisdiction here. Once the threshold requirement of purposeful contact is shown, as it has been here, jurisdiction cannot be defeated unless the defendant "present[s] a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King, 471 U.S. at 477. This phase of the analysis involves a balancing of competing interests, including, among other things, the shared interest in furthering fundamental substantive policies, the forum state's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief. Id. at 476-77.

The brief of Petitioners and, curiously, even that of the United States, contain no arguments that the result they advocate would further any public policy interests. Their silence can be explained by the fact that they have nothing to say. Public policy weighs strongly in this case in favor of finding jurisdiction.

As discussed above, it is clear that the legislative purpose in enacting the FSIA was to put foreign governments on nearly equal footing with private parties when they chose to engage in commercial activities.[10] As Monroe Leigh, Legal

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[10] To be sure, foreign private parties can be subjected to jurisdiction in the United States based upon substantial contacts other than the business activity in dispute, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), whereas there must be a relationship between the business activity sued upon and the substantial contact in order to hold a foreign government-owned enterprise accountable in the United States courts. (Footnote continued)

Advisor to the Department of State and a participant in the drafting of the bill that resulted in the FSIA, testified:

> [W]hen a foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties. These principles of international law are embodied in sections 1604 through 1607 of the bill . . . .

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(Footnote 10 continued from previous page) But, with the exception of this distinction, which presumably is grounded in foreign policy considerations and in any event is not applicable here, there was a clear congressional intent to hold government-owned enterprises to the same accountability as private businesses.

tive Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976).

What makes this case different from the routine commercial dispute involving an employment relationship is that Petitioners here resorted to what, by our standards, were very unprofessional means to resolve their disagreement. Petitioners and the United States argue in effect that the means employed -- brutality -- is so extraordinary in a business context that it cannot be considered part of a course of commercial activity, especially when foreign police are involved. This reasoning then leads them to the draconian conclusion that the more heavy-handed the commercial conduct becomes, the less actionable it should be in a United States court. In other words, for some reason Petitioners and the United States do not

explain, the United States loses any public policy interest, and the FSIA's commercial exception ceases to apply, once the foreign government resorts to brute force to resolve its commercial disputes.

This reasoning is irreconcilable with the policy of the FSIA. The FSIA was enacted to ensure, among other things, that United States citizens would have access to their own courts to redress grievances in their business relationships with foreign governments. The policy was to hold foreign governments that choose to do business here to the standards of fair dealing that are established by the laws of this country and the international community and applied to entirely private business transactions. Yet in this case, when Petitioners chose to deal not just unfairly, but outrageously, in violation of all recognized standards of decency in

this country and the international community, they argue that that fact alone should allow them to escape jurisdiction here.

The result of such a standard would be to encourage lawlessness in international business relationships, in direct contradiction of the policy the FSIA and the restrictive theory of sovereign immunity. Foreign governments would be encouraged to get out of their business deals not by the usual means of compromise and fair dealing, or even by simply refusing to honor their contracts, but instead by arbitrarily declaring the business activity unlawful and, in extreme cases like this one, bringing in the police to "enforce" the law and exact punishment.

Petitioners and the United States do not and cannot argue that it would jeopardize our country's foreign

policy interests to make human rights abuses carried out by governments in a business context actionable in our courts. To the contrary, the international community has been moving steadily in the direction of combatting such abuses even when they are carried out under actual or apparent government authority. The General Assembly of the United Nations expressed this strong policy proscribing acts of torture in its Declaration on the Protection of All Person from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975), which forbids any State to "permit or tolerate" torture, even in cases of "exceptional circumstances." In interpreting the proscription against torture in the International Covenant on Civil and Polit-

ical Rights, the United Nations Human Rights Committee has specifically required member states to provide "effective remedies . . ., including the right to obtain compensation," to all torture victims, whether the torture was committed by persons acting under color of state authority or otherwise. See International Covenant on Civil and Political Rights, Art. 7 and General Comment 7, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 176, U.N. Doc. A/6316 (1966).[11]

The United States is a party to these instruments condemning human rights

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[11] The universal abhorrence of torture and other cruel, inhumane or degrading treatment or punishment has contributed to its prohibition as a matter of customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

abuses and calling for means by which they can be redressed in the courts. Congress recently advanced this policy through legislation. The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (March 12, 1992), among other things, provides a private cause of action against torturers over whom personal jurisdiction can be obtained. Id.[12] The sponsor of that legislation described the purpose of the statute as follows:

> "[O]ne reason for enacting this bill is to discourage torturers from ever entering this country. There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States."

103 Cong. Rec. S2667 (daily ed. Mar. 3, 1992) (statement of Senator Specter).

The impact of abandoning these policies and establishing a special immunity under the FSIA for torture committed in a commercial context by foreign sovereigns would be dramatic. While such business practices may be generally unfamiliar to this country, except perhaps among drug dealers and loan sharks, but they are all too common in some other countries. In fact, we need look for further than Saudi Arabia -- the very country at issue here -- to confirm that physical abuse in the context of employment disputes is in some nations commonplace and could well become

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[12] As discussed above, Respondents rely solely on the commercial exception to the FSIA for jurisdiction here. Respondents have not asserted any claims against the Saudi officials who actually committed the torture and do not allege jurisdiction over Petitioners under the Torture Victim Protection Act of 1991. Thus, the Court need not address the issue whether jurisdiction exists under that statute. However, the Court can note its existence as support for the general proposition that the United States has a policy of providing remedies to torture victims, whether the actual torture occurred in the United States or not.

even worse if the United States courts were to carve out a special immunity for such conduct when inflicted by foreign government owned enterprises.

An extensive, two-year study on human rights in Saudi Arabia by the Minnesota Lawyers Committee resulted in a report which concludes that "[i]t is common for Saudi employers to threaten their foreign workers with police involvement in work related disputes." See Minnesota Lawyers Int'l Human Rights Comm., Shame in the House of Saud: Contempt for Human Rights in the Kingdom of Saudi Arabia 67 n.215 (1992) ("Minnesota Lawyers Comm.").

The report cites as one example:

> Letters written by most of the employees [medical workers at the Al Ahla Polyclinic in Hail] described threats, harassment, and physical abuse by their employer. The employer frequently threatened to have the workers arrested for making complaints. The employer also threatened to kill or otherwise

> hurt the employees should they complain of ill treatment to the Saudi officials.

Id.

The Minnesota Lawyers Committee cites as a further example:

> Domestic servants allege they receive regular beatings if their employers were dissatisfied with their work or in a bad mood. Stories of beatings, sometimes with objects such as a hairbrush or spike-heeled shoe, are not uncommon.

Id. at 70. Referring to a 1987 internal report from the Philippine Embassy documenting 230 cases of physical or sexual abuse of domestic workers by Saudi employers, the Minnesota Lawyers Committee notes that "it is not uncommon for [Social Welfare Administration] officials to require that the Filipinos provide sexual favors in exchange for making a telephone call to the Philippine embassy." Id. at 72-73.

Detention and arrest of employees at the direction of employers is also

by its nature commonplace commercial activity in Saudi Arabia. The report describes one case in which a

> worker told of complaining to his employer when he did not receive his salary. He also went to the Riyadh office of the agency that recruited him. After complaining, he was locked in this room for an entire month by his employer. He was also forced to sign a release before his employer would give him an exit visa and pay for his ticket home, as required by his contract.

Id., at 60-61. Owners of private Saudi businesses "routinely" commit these acts in Saudi Arabia as part of their "slave-like treatment of foreign workers." Id. at viii-ix.

If the United States courts were to close their doors to suits by American citizens who may become victims of physical abuse inflicted by foreign governments in an employment context, then that conduct would, for all practical purposes, be

completely unredressable. There is simply no possibility that Respondents would obtain relief in the courts of Saudi Arabia, and may well be subjected to further abuse if they tried.[13]

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[13] Any attempt by Respondents to seek redress in Saudi Arabia for the human rights abuses they suffered would be rendered futile by:

(1) discriminatory and insurmountable evidentiary standards, see, e.g., A. Lerrick Saudi Business and Labor Law 213 (2d ed. 1987) (two Muslim male witnesses or a signed confession required to prove allegations of physical injury);

(2) the lack of an independent judiciary, e.g., United States Department of State, Country Reports on Human Rights Practices for 1991, 1577 (1992) ("Country Reports") ("jurists . . . reportedly have . . . acceded to the power and influence of the royal family"); Minnesota Lawyers Comm., supra at 24 (1992) ("The power of the King to appoint and remove any judge at will seriously undermines the independence and credibility of the Saudi judiciary."); Middle East Watch, Empty Reforms: Saudi Arabia's New Basic Laws 23 (1992) (the Board of Grievances "is merely a governmental body that defers to the wishes of

(Footnote continued)

On the other hand, subjecting Petitioners to suit in the United States courts would be both fair and just. Petitioners have substantial contacts with the United States, not just in connection with Respondents but to conduct their business

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(Footnote 13 continued from previous page)
the Council of Ministers and the King");

(3) the absence of the most basic procedural safeguards, see, e.g., Country Reports, supra at 1578 (no right to counsel or to examine or cross-examine witnesses); A. Lerrick, supra at 211 (same), Middle East Watch, supra at 22 (law providing for right to file legal suit "fatally flawed . . . by the absence of a written law of judicial procedures"); and

(4) the inability to obtain meaningful compensation. See, e.g., A. Lerrick, supra at 333-35 (maximum recovery under Saudi law for death is value of 100 camels and for personal injury it is one-third that amount); Minnesota Lawyers Comm., supra at 28 (a foreign victim generally receives compensation between one-third and one-fourth of amount received by a Saudi victim).

generally. There would be no significant burden for them to defend this case in the United States courts.

Upholding the jurisdiction of the United States courts here also would and should help prevent the type of employment practices alleged here, where the torturer affirmatively comes to this country to take advantage of our laws and markets to recruit and hire its employees for a commercial enterprise. In those circumstances, it is appropriate and fair to hold that government, in its commercial activities related to those employees, accountable in our courts. That is precisely the policy behind the FSIA, and it should be applied in this case.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of

Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL and ROYSPEC,

Petitioners,

—v.—

SCOTT NELSON and VIVIAN NELSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF HUMAN RIGHTS WATCH IN SUPPORT OF RESPONDENTS

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—v.—

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.4, Human Rights Watch hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of the position of the respondents in this case. The parties' consent has been requested. Respondents have consented, but petitioners have refused.

Human Rights Watch is a non-partisan, non-governmental human rights organization based in New York. It has submitted *amicus curiae* briefs to this and numerous other U.S. courts, and has substantial expertise on questions of international human rights law.

Through Middle East Watch, its regional division, Human Rights Watch monitors and reports on civil and political rights

conditions in the Middle East and North Africa. Members of its staff regularly travel to the region, including Saudi Arabia, to conduct interviews with victims and witnesses of human rights violations as well as to meet with government officials responsible for human rights matters.

Human Rights Watch believes that its detailed knowledge of human rights practices in Saudi Arabia will assist this Court in determining whether the abusive conduct alleged to have occurred in this case should be treated as "commercial activity" under the Foreign Sovereign Immunities Act ("FSIA"). The accompanying brief sets forth the results of extensive research into Saudi human rights practices which tend to show that such characterization is appropriate because the Saudi government often uses torture and detention to resolve commercial disputes.

The accompanying brief also brings to the Court's attention international law establishing a duty to provide torture victims with an opportunity to obtain compensation. Given the unlikelihood that petitioners can obtain compensation in Saudi courts, and in light of petitioner Scott Nelson's recruitment in the United States, Human Rights Watch believes that the Court should be aware of this international law in resolving any ambiguity in the reach of the "commercial activity" exception to the FSIA.

Because neither the pertinent international law nor the nature of Saudi human rights practices is likely otherwise to be brought to the attention of the Court, Human Rights Watch respectfully seeks leave to file the accompanying *amicus curiae* brief.

Dated: New York, New York
September 8, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL
and ROYSPEC,

Petitioners,

—v.—

SCOTT NELSON and VIVIAN NELSON,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS WATCH

Human Rights Watch submits this brief as *amicus curiae* in support of the affirmance of the order of the U.S. Court of Appeals for the Eleventh Circuit.

Interest of *Amicus Curiae*

Human Rights Watch is a non-partisan, non-governmental human rights organizations based in New York. It is the largest U.S.-based international human rights organization, and is composed of five regional divisions: Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, and Middle East Watch.

Human Rights Watch monitors violations of civil and political rights worldwide, including torture and arbitrary detention. It has conducted multiple fact-finding investigations in scores of countries. Its reports on human rights conditions have received significant attention from the State Department, Congress, the United Nations, and the press. By exposing and focusing public attention on human rights violations, Human Rights Watch seeks to end abusive practices.

Middle East Watch is the division of Human Rights Watch that monitors and reports on human rights conditions in the Middle East and North Africa. Members of its staff regularly travel to the region, including Saudi Arabia, to interview victims and witnesses of human rights violations as well as to meet with government officials.

Human Rights Watch has submitted *amicus curiae* briefs to this and numerous other U.S. courts. It believes that its extensive knowledge of human rights practices in Saudi Arabia and of international human rights standards will assist this Court in determining whether the abusive conduct alleged to have occurred in this case should be treated as commercial activity under the Foreign Sovereign Immunities Act because it is consistent with the way the Saudi government often resolves commercial disputes.

Statement of the Case

In September 1983, respondent Scott Nelson ("Nelson"), a 29-year-old U.S. citizen working in Kentucky as a senior electrical engineer for Bechtel, saw a magazine advertisement for a job as a monitoring systems engineer at the King Faisal Specialist Hospital (the "Hospital"), a government-owned and operated medical center in Riyadh, Saudi Arabia. J.A. 4, 57.[1] The advertisement had been placed by an American corporation that had contracted with the Saudi government to act as its agent in the recruitment of employees in the United States. The

1 Citations to "J.A." refer to the Joint Appendix.

job's responsibilities were "to inspect and monitor all hospital facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others." J.A. 4.

Nelson applied for the job and traveled to Saudi Arabia for interviews. He then returned to the United States, where he executed a contract of employment in Miami and participated in a brief orientation program in Nashville. In December 1983, Nelson and his wife, Vivian, traveled to Saudi Arabia, where Nelson began his employment.

Nelson claims that in March 1984, in the course of performing his duties as a monitoring systems engineer, he discovered a highly dangerous defect in the Hospital's oxygen and nitrous oxide lines. He reported it to his superiors and eventually to a governmental commission of investigation, but no corrective action was taken, and he was instructed to ignore the problem. He thereafter began to face harassment on the job and twice tried to resign, but the Hospital refused to accept his resignation or return his passport. J.A. 52-53.

On September 27, 1984, Nelson was asked to come to the Hospital's security office. Nelson later described some of what happened next in testimony before a Congressional subcommittee investigating the mistreatment of Americans employed in Saudi Arabia:

> I was met there by two investigators who wanted to interview me for a few minutes. Neither investigator spoke English. I was then taken to the Criminal Investigation Division, CID. There, in a small cell, a man put me in foot shackles and pushed me to the floor. Four men then entered the cell; one man slapped me in the face, breaking my glasses. Another then punched me in the back of the neck and lower back. Two of the men held my feet while another pulled my shoes off and beat my feet with bamboo canes approximately 1/4 inch in diameter. . . .
>
> I was punched, kicked and slapped on the back, chest, legs and face repeatedly for about thirty or thirty-five minutes. Afterwards, water was thrown on my face and the beat-

ings resumed for approximately fifteen-twenty more minutes. I was then released from the shackles. All the while no one spoke any English to me at all. Four days passed and I had not been fed since my arrest. On October 1, 1984, I was taken to an office of the Head of the Prison. There I was met by Mr. Omar, a translator from the hospital. The first thing he said to me was sign anything they ask or I will continue to be beaten until I sign any statement they asked me for.

I then signed a statement totally in Arabic that was never interpreted to me. I was then returned to my cell.

After 15 to 20 minutes later, the U.S. Embassy agents . . . talked with me. They had been ordered not to speak with me about my arrest, only about my family. They told me that I should be released in one week at the most. I was given the statement to sign by Lt. Abdullah Aziz. He said that I did nothing wrong in Saudi Arabia and should be released within a week.

I told the Embassy about my beatings. They told me that if a report was filed by them it could make matters worse for me.

On October 3, 1984, I was transported to Al Sijan Prison to await trial on unknown charges. On October 4, 1984 (one week after my arrest), I was visited by the Embassy. They told me that they could not do anything for me, but that they expected my release in "one to two weeks." I never saw any Embassy personnel again.

J.A. 53-54.

Nelson was kept in custody for 39 days. J.A. 54. During his incarceration, his wife was given only sketchy information about him, but a Saudi official offered to obtain her husband's release if she would spend a weekend with him. J.A. 5, 54. Finally, after a U.S. Senator and Congressman intervened, Nelson was released from custody on November 5, 1984. J.A. 54, 60.

The parties disagree about the reason for Nelson's arrest, but agree that his arrest arose from his position at the Hospital. Nelson claims that he was arrested in retaliation for his actions as a whistle blower. Petitioners claim that he was arrested because he had falsified his academic credentials in applying for his job. In either event, no charges were ever filed against Nelson. J.A. 5. After his release from custody, he was prevented from leaving Saudi Arabia for one week. As soon as he could retrieve his passport, however, he and his wife returned to the United States, where he underwent repeated orthopedic surgery and physical therapy for injuries to his knees and back caused by the beatings. J.A. 5, 55, 61.

The Nelsons thereafter commenced this action in the U.S. District Court for the Southern District of Florida. They seek compensatory and punitive damages from the Saudi government, the Hospital, and Royspec, a government-owned procurement agency. Their complaint (J.A. 3-21) asserts various intentional tort claims on Nelson's behalf—for battery, wrongful arrest, false imprisonment and torture—as well as claims for a negligent failure to warn, and derivative claims on behalf of Vivian Nelson.

The defendants, petitioners here, moved to dismiss the action for lack of subject matter jurisdiction, claiming, among other things, that each of them was a foreign state or instrumentality of a foreign state and thus immune from suit in this country pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*

The District Court dismissed the action for lack of subject matter jurisdiction under the FSIA. J.A. 91-98. The Court of Appeals reversed, holding that this action falls within the exception for "commercial activity" contained in the first clause of § 1605(a)(2). *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991); *see also* J.A. 99-115. After the Court of Appeals denied a petition for rehearing made by petitioners and supported by the U.S. government (J.A. 133), this Court granted certiorari.

Summary of Argument

In interpreting whether the actions of a foreign government amount to "commercial activity," the FSIA requires examination of whether the actions are part of "a regular course of commercial conduct." 28 U.S.C. § 1603(d). Because the Saudi government often uses detention and torture to resolve commercial disputes, its abusive treatment of Nelson should be held to fall under the "commercial activity" exception to the FSIA.

Moreover, international law requires that torture victims be given an opportunity to obtain compensation from those responsible for their mistreatment. Because Nelson is extremely unlikely to obtain civil redress in Saudi courts, and in light of his recruitment in the United States, this Court should resolve any ambiguity in the reach of the "commercial activity" exception in favor of providing Nelson a civil remedy in U.S. courts.

Argument

I. NELSON'S TORTURE AND ARBITRARY DETENTION SHOULD FALL UNDER THE "COMMERCIAL ACTIVITY" EXCEPTION TO THE FSIA BECAUSE SAUDI OFFICIALS OFTEN COMMIT SUCH ABUSES IN CONNECTION WITH COMMERCIAL DISPUTES

A. The "Commercial Activity" Exception Should Be Interpreted in Light of the Saudi Government's "Regular Course of Commercial Conduct"

In its most recent decision under the FSIA, *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160 (1992), this Court observed that the principal ambiguity in the FSIA's exception for "commercial activity" lies in the definition of the word "commercial." The Court commented, however, that the FSIA "was not written on a clean slate," but embodies the "restrictive theory" of foreign sovereign immunity adopted by the State Department in 1952. *Id.* at 2165. Under that theory, there is immunity "only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976). Therefore, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, *supra*, at 2166.

This Court further observed in *Weltover* that under the FSIA it is the "nature" of the act and not its "purpose" that is determinative of its commercial character. The Court explained:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."

112 S.Ct. at 2166 (citation omitted).

Petitioners argue that the decision of the Court of Appeals in the present case contravenes the FSIA by "requiring Saudi Arabia to appear in a United States court to defend the manner in which it enforces its laws and exercises its police power within its own borders." Pet. Br. at 15.[2] Petitioners go on to claim that "a foreign state's actions such as arrest, interrogation, imprisonment, and physical punishment are plainly actions of a governmental rather than commercial *nature*," even if "they relate to a commercial *purpose*." Pet. Br. at 16 (emphasis in original).

Petitioners misconstrue *Weltover*, the plain meaning of the FSIA, and the intent of Congress. In § 1603(d), the FSIA defines "commercial activity" in pertinent part as "a regular

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2 Citations to "Pet. Br." refer to the Brief for Petitioners.

course of commercial conduct." This broad language was intended to provide the courts with "a great deal of latitude in determining what is a 'commercial activity' " so as to "includ[e] a broad spectrum of endeavor." H.R. Rep. No. 94-1487 at 16, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604.

The Saudi government's alleged torture and arbitrary detention of Nelson in connection with his employment dispute should be considered "commercial activity" for the purpose of the FSIA because, as we show, in addition to being used for a "commercial purpose," torture and arbitrary detention by the Saudi government assume a "commercial nature" because they are often used to resolve commercial disputes, particularly when the royal family and its close associates have an interest.

B. The Saudi Government's "Regular Course of Commercial Conduct" Includes the Use of Torture and Arbitrary Detention In Connection With Commercial Disputes

According to first-hand research conducted by Middle East Watch, it is common practice for public and private enterprises to enlist the Saudi government to detain and sometimes torture adverse parties in commercial disputes. Saudi law does not require written authorization for such arrests. Disputes that can trigger detention include nonpayment of debts, employment disputes, and the failure to fulfill contractual obligations. To "resolve" these disputes, the police detain the adverse party and use force, including slapping and beating with bamboo sticks, to secure concessions. The Division of Civil Rights (*al-Huquq al-Madaniyya*), the division of the Ministry of Interior that is responsible for enforcement of civil claims, is particularly notorious for such abuse.

Middle East Watch knows of scores of people who are currently detained without charge or trial as a result of commercial disputes. Some of these businessmen have been kept in detention for years. After an initial period of incommunicado detention, family visits are usually authorized. The prisoner

and his family are then advised to seek an accommodation with the person who initiated the complaint.

Although both Saudis and foreigners are subject to such detention and abuse, foreigners are particularly vulnerable because of the fear that they might flee, especially if their assets in the country are small in relation to the amount in dispute. Detention occurs even though foreigners may not legally leave Saudi Arabia, or the locality in which they reside, without the express permission of their *kafil*, or Saudi sponsor—either an employer or a senior business partner.[3]

Police action is particularly likely if, as in the case of Nelson, the Saudi royal family or a prominent Saudi citizen has an interest in the case. Because King Faisal Specialist Hospital is an elite hospital established to provide care primarily to the royal family, senior officials and their associates, hospital officials are likely to have had access to the royal family to pursue their dispute with Nelson. The royal family, in turn, controls the Ministry of Interior, which oversees—either itself or through regional governors—all internal security forces in the country. The Minister of Interior is Prince Nayef ibn Abdel-Aziz, and his deputy is Prince Ahmed ibn Abdel Aziz, both full brothers of King Fahd. All regional governors in Saudi Arabia are members of either the royal family or the Sudairi family, the maternal relatives of the King.

Despite its brief in support of its close ally, the U.S. government has previously acknowledged the Saudi government's use of arbitrary detention to resolve commercial disputes. In an October 8, 1986 letter to Rep. Mel Levine, then Secretary of Commerce Malcolm Baldrige wrote:

> The distinction between civil and criminal law remedies in Saudi Arabia is blurred, and personal detention pend-

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3 At the beginning of employment and upon return from foreign travel, a foreigner must surrender his passport to the sponsor. To travel within the country, a foreigner needs his passport and a letter from his sponsor. To leave the country, a foreigner needs an exit visa, which cannot be obtained without permission of the sponsor indicated on his passport.

> ing the settlement of a commercial dispute can occur. . . .
>
> We regularly provide businessmen with brochures and other material on Saudi Arabia containing a warning on this legal practice. We advise individuals with commercial disputes pending in Saudi Arabia not to enter the country.

Similarly, on June 15, 1987, James B. Kelly, then a deputy assistant secretary of commerce, told the House Subcommittee on Europe and the Middle East: "The lack of distinction between civil and criminal law in Saudi Arabia permits the detention of resident and visiting businesspersons for what we would consider a commercial dispute."[4]

Middle East Watch has investigated a substantial number of cases of businessmen and foreign workers who were detained for having run afoul of their Saudi partners or members of the royal family. Some, after their release, reported that they had been tortured during detention.

For example, in March 1991, in a villa used as a detention facility in Riyadh, Middle East Watch interviewed Abdalla Saleh al-Rajhi, a Saudi banker who had been arrested in early 1980. As of mid-August 1992, he was still in detention. Al-Rajhi was arrested after the government closed down his investment company because certain foreign investors had complained that its aggressive investment policy in precious

4 The U.S. government has also described the Saudi government's related practice of denying American businessmen exit visas pending resolution of commercial disputes with their Saudi associates. In a letter to Rep. Levine dated October 21, 1986, then Assistant Secretary of State for Legislative and Intergovernmental Affairs J. Edward Fox wrote:

> Over the past twelve months, our Mission in Saudi Arabia has received reports of twenty-six commercial and labor disputes which have resulted in the retention of an American citizen's passport or the barring of the American's exit from the Kingdom pending resolution of the dispute.

Copies of these statements are on file in Human Rights Watch's offices and can be made available to the Court.

metals had exposed them to too great a risk. After twelve years in detention, he has not been tried or allowed even to consult with legal counsel, although he is permitted family visits. A secret committee at the Ministry of Interior has reviewed his case, but its findings have not been revealed. Neither al-Rajhi nor any representative was permitted to attend the committee's deliberations.

In another case which, like Nelson's, involved an alleged whistle blower, a government employee reported being detained for four weeks and severely beaten by officers of the Directorate of General Investigations (*al-Mabaheth al-`Amma*), the secret police, because he was suspected of sending an anonymous letter charging that his superiors were involved in skimming funds earmarked for projects.[5] The interrogators sought to force him to confess that he was the author of the letter.

The following are a few of the many cases investigated by Middle East Watch:

- Sam Joseph Bamieh, chairman of the board of Industrial Development Group, Inc., traveled to Saudi Arabia in February 1986 after having filed suit in a California court against one of his business associates, Muhammed Omran, the former head of King Fahd's private office. On March 2, after Omran was served with papers for the California action, Bamieh was interrogated vigorously by two of King Fahd's close associates. He was threatened with death if he did not drop his suit, and when he refused, he was instructed not to leave the country and put under close surveillance. For two months, from May 12 to July 14, he was detained in a government guest house. He was released after he instructed his attorney to obtain a dismissal with prejudice of the California lawsuit and to send the ruling by courier to Saudi Arabia.

5 This victim and several others interviewed by Middle East Watch requested that their names not be revealed for fear of retaliation by Saudi authorities.

- In August 1991, Neville Norton, a British businessman, was released after spending five years in detention without charge or trial. For the previous 11 years, his passport had been confiscated and he was unable to leave the country. The reason for this treatment was his failure to finish projects for and pay debts he owed to his sponsor, Prince Nayef ibn Abdel-Aziz, King Fahd's brother and currently the Minister of the Interior (at the time, Prince Nayef was Deputy Minister of the Interior).

- Keith Carmichael, a British citizen and the head of SACEM International, a transnational construction firm, told Middle East Watch that in 1981 a dispute arose over a SR350,000 (US$93,000) commission and another SR400,000 that SACEM allegedly owed SIGMA, a company owned by Prince Abdalla al-Faisal al-Saud, a prominent businessman, and operated by his son, Prince Saud. When negotiations failed, Carmichael feared that he would be imprisoned at the behest of Prince Saud and tried to flee to Qatar, where he was arrested by Qatari police, returned to Saudi Arabia, and detained without trial from November 2, 1981 to March 7, 1984. During interrogation by the Directorate of General Investigations and later by the Division of Civil Rights, he was held incommunicado, beaten and denied adequate medical attention. He was released when the British government intervened.

- Bruce Munden, an American, told Middle East Watch that after his Saudi business partners accused him of owing them $175,000, the Saudi police arrested him and kept him in jail for eight months. Several times during his first week in detention he was handcuffed to a rack for an hour at a time with his legs spread, his feet shackled, and his toes barely touching the ground. He was never charged or tried.

- A businessman who requested anonymity established a number of franchises in 1990 that competed with an existing chain owned by a senior member of the royal family. His rival complained to the governor, a cousin, that the new businesses were unfairly competing with his outlets. A number of the new facilities were closed down and the businessman was detained until he agreed to relocate them.

In light of the Saudi government's consistent use of detention and torture to resolve commercial disputes in which it has an interest, its alleged detention and torture of Nelson in connection with his employment dispute should be considered "commercial activity" within the meaning of the FSIA. *See Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (embassy acted as "collection agent," not a foreign sovereign, in extracting payments from plaintiff).

II. BECAUSE TORTURE AND ARBITRARY DETENTION ARE INVOLVED, ANY AMBIGUITY IN THE REACH OF THE "COMMERCIAL ACTIVITY" EXCEPTION SHOULD BE RESOLVED IN LIGHT OF THE DUTY UNDER INTERNATIONAL LAW TO PROVIDE NELSON AN OPPORTUNITY TO SECURE COMPENSATION

Petitioners argue that because of the importance of avoiding "judicial intrusion into the internal affairs of foreign states," "this Court should be especially reluctant to construe the 'commercial activity' exception in an expansive manner that would subject the internal public acts of a foreign sovereign to the scrutiny of United States courts." Pet. Br. at 31. Whatever merit that argument might have ordinarily, it deserves no deference when the acts in question involve torture and arbitrary detention of a victim recruited in the United States. At the height of the Cold War, it was common to hear from abusive countries that examination of their human rights records was interference in their internal affairs. Fortunately, that argument has now been firmly discredited. *See Human Rights Watch World Report 1992*, p. 3.

Today, it is firmly established that torture and arbitrary detention violate international law and that, at the very least, torture victims should have an opportunity to obtain compen-

sation. Because, as we show, Nelson is extremely unlikely to be able to obtain civil redress in Saudi courts, and given his recruitment in the United States, this Court should construe any ambiguity in the reach of the "commercial activity" exception in favor of providing him a civil remedy for his ordeal in U.S. courts.

A. The Saudi Government's Alleged Treatment of Nelson Constitutes Torture

The Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), June 26, 1987, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), is the leading international instrument on torture. The U.S. Senate has given its advice and consent to the Convention, and President Bush has signed the instrument of ratification, which will be deposited with the U.N. Secretary-General once Congress passes the necessary implementing legislation. Article 1(1) of the Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[6]

6 The U.S. government has elaborated on this definition, noting that torture must be committed by someone acting in an official capacity or with the acquiescence of a person in an official capacity, "it must be an extreme form of cruel and inhuman treatment, it must cause severe pain and suffering, and it must be intended to cause severe pain and suffering." Message from the President of the United States Transmitting the Torture Convention, Treaty Doc. 100-20, 100th Cong., 2d Sess. at 3 (1988).

Nelson's complaint alleges on its face that he was subjected to torture under this standard. According to the complaint, Nelson was beaten and tortured while being held by Saudi law enforcement officers for 39 days without being advised of any charges or accused of any crimes. The apparent purpose was to force him to sign certain "Arabic papers" which he did not understand and were not translated to him.

A variety of international fora have held that treatment similar to that accorded Nelson constitutes torture. For example, Article 7 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("Covenant"), provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United States ratified the Covenant in June 1992. The Human Rights Committee, a body of experts empowered to hear individual complaints of violations of the Covenant, has held that beatings during captivity are torture. *See, e.g., Bleier v. Uruguay*, (30/1978), Report of the Human Rights Committee, 37 U.N. G.A.O.R. Supp. (No. 40) Annex X, at 130 (1982); *Bazzano (Hernandez) and Massera v. Uruguay*, (5/1977), Report of the Human Rights Committee, 34 U.N. G.A.O.R. Supp. (No. 40) Annex VII, at 124 (1977).

Similarly, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("European Convention"), provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The European Commission on Human Rights, which is empowered to consider petitions concerning violations of the Convention, has held that beatings by law enforcement officers of a person in custody constitute torture. *See, e.g., The First Greek Case (Denmark, Norway, Sweden, & Netherlands v. Greece)*, 12 Y.B. Eur. Conv. on Hum Rts. 499 (1969).

Likewise, Article 5(2) of the American Convention on Human Rights ("American Convention") categorically prohibits torture. Nov. 22, 1969, Treaty Series No. 36, O.A.S. Off. Rec. OEA/Series K/XVI/1.1. The Inter-American Commission

on Human Rights, which is empowered to consider complaints of human rights violations in the Americas, has also found that police beatings of prisoners are torture. *See, e.g., Gomez v. El Salvador*, Report No. 6/92, Case 10.190, 1991 Annual Report of the Inter-American Commission on Human Rights 99, 101, 104 (Feb. 4, 1992), O.A.S. Doc. No. OEA/Ser.L/V/II.81 rev.1 Doc.6 (Feb. 14, 1992).

B. International Law Establishes a Duty to Provide Torture Victims With an Opportunity to Obtain Compensation

The international prohibition against torture is so strong that it is one of the few human rights norms that have achieved the status of *jus cogens*, a peremptory norm from which no derogation is ever allowed. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); Restatement (Third) of the Foreign Relations Law of the United States § 102 comment k, § 702(d) (1987).

Reflecting this status, Article 14 of the Torture Convention states that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." The Covenant (Art. 2(3)), the American Convention (Art. 25) and the European Convention (Art. 13) also require that individuals be given an effective remedy in such cases.

In a general comment on the Covenant, the Human Rights Committee found that Article 2(3) requires that "the alleged victims [of torture] must themselves have effective remedies at their disposal, including the right to obtain compensation." General Comments under Art. 40, ¶ 4 of the Covenant, *Report of the Human Rights Committee*, 37 U.N. G.A.O.R. Supp. (No. 40) Annex V, General Comment 7(16), at 94, ¶ 1 (1982).

The Human Rights Committee's case law confirms the right of torture victims to obtain compensation. In *Estrella v. Uruguay*, (74/1980), *Report of the Human Rights Committee*, 38 U.N. G.A.O.R. Supp. (No. 40) Annex XII, at 150 (1983),

the Human Rights Committee ruled that Uruguay was "under an obligation to provide [one of its torture victims] with effective remedies, including compensation." *Accord, Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights, Series C, No. 4, ¶¶ 166, 174, 175.

Because, as we show, Saudi Arabia provides no civil (or criminal) remedies to torture victims, and in light of Nelson's recruitment in the United States, this Court should interpret any ambiguity in the reach of the "commercial activity" exception to the FSIA to provide Nelson with a civil remedy in U.S. courts.

C. Saudi Arabia Provides No Effective Remedies for Torture or Arbitrary Detention

Saudi Arabia has no legal regime to protect against arbitrary arrest, lengthy pretrial detention or physical abuse. It has no bill of rights or comparable legal guarantees. It has declined to sign most international human rights agreements, including the Covenant and the Torture Convention. Indeed, Saudi Arabia was one of only a handful of countries—South Africa and former Soviet Bloc countries were the others—that did not vote for the Universal Declaration of Human Rights when it was adopted by the U.N. General Assembly on December 10, 1948.

On March 1, 1992, amid great fanfare, King Fahd issued the Basic Law of Government—the closest that the country has ever come to adopting a constitution. The Basic Law provides in Article 26 that "[t]he state shall protect human rights according to Shari`a," or Islamic law. This provision marks the first time in Saudi history that the government has formally acknowledged the concept of citizens' rights vis-a-vis the state.[7] However, in the few instances in which the new law

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7 The Saudi government's use of the phrase "civil rights" (*al-huquq al-madaniyya*) should not be confused with the concept of human rights, since it refers only to civil claims among private citizens. Indeed, as noted, the Saudi Ministry of Interior's Department of Civil Rights, which oversees such matters, has frequently been implicated in human rights violations in its zeal to protect property rights.

refers to specific civil and political rights, the protection afforded is highly qualified.[8] Moreover, the reference to the Shari`a is problematic because the Shari`a as applied in Saudi Arabia is not codified in written laws. The final nominal authority for its interpretation is the government-appointed Council of Senior Scholars, which has traditionally deferred to the King's interpretation in political matters, including those implicating human rights. Despite the Basic Law, the Saudi government thus retains near complete discretion to define the content and scope of the rights it will respect.

1. Saudi Law Provides No Protection Against Arbitrary Arrest and Detention

Saudi arrest and detention procedures are governed by Imprisonment and Detention Law No. 31 of 1978, together with Bylaws issued in 1982 by the Minister of Interior. They place few restrictions on the grounds or duration of pretrial detention. Detainees may be held indefinitely without trial or judicial review. Nor is there a requirement that family members be notified of the arrest. Although in recent years a family is often able to find out if one of its members is detained, formal notification is rare.[9] It is equally rare for a detainee to be informed of the charges against him or her. Saudi law permits interrogation of detainees without the benefit of counsel.

2. Saudi Law Provides No Protection Against Torture or Cruel and Inhuman Punishment

Saudi law contains no explicit ban on torture or cruel and inhuman punishment. Indeed, the use of force to elicit confessions is common in the Saudi security system. Harsh conditions of detention are also frequently imposed to punish prisoners.

8 For a detailed analysis of the limits to these guarantees, see Middle East Watch, *Empty Reforms: Saudi Arabia's New Basic Law* (1992).

9 The U.S. Embassy in Riyadh has complained that Saudi authorities rarely notify it of the arrest of U.S. citizens. According to State Department officials interviewed by Middle East Watch in September 1992, Saudi Arabia has declined to sign a bilateral consular treaty to allow for immediate access.

While Imprisonment and Detention Law 31 of 1978 prohibits "any assault whatsoever on prisoners and detainees" (Article 28), the same law explicitly sanctions methods of discipline that violate international standards, such as flogging, indefinite solitary confinement, and deprivation of family visits and correspondence (Article 20). Flogging and amputations are also imposed by the courts as punishment for a variety of crimes. Saudi security officials interviewed by Middle East Watch over the past two years did not consider flogging or hitting detainees to extract confessions to be forms of torture or cruel or inhuman punishment. Although they professed a preference for the use of "psychological methods" to obtain confessions, they believed that beating and slapping suspects is permissible and that torture consists of only severe abuse such as electric shock and fingernail extraction.

Despite occasional royal orders instructing detention authorities not to torture prisoners—usually issued after the death of a detainee due to torture—there have been numerous reports of torture in Saudi detention facilities. For example, in its most recent report on human rights in Saudi Arabia, the U.S. State Department described "credible reports of injuries and the deaths of at least two, and possibly more, persons caused by beatings or the use of excessive force while being held in official custody. In addition, there was a credible report of the torture of several foreigners in Saudi military custody." U.S. Department of State, *Country Reports on Human Rights Practices for 1991*, at 1577, February 1992 ("*Country Reports*").

Middle East Watch knows of no case in which an officer accused of torture has been brought to trial in Saudi Arabia. Results of investigations into deaths in custody have never been made public. As the U.S. State Department recently observed, "It is general [Saudi] government policy not to respond to" reports of mistreatment of prisoners. *Id.* In addition, the Saudi government has never allowed independent observers to visit its detention facilities, with one exception

when, after months of refusal, it allowed the International Committee of the Red Cross to visit Iraqi prisoners of war after the beginning of the Desert Storm military campaign on January 17, 1991.

3. There Is No Independent Judiciary in Saudi Arabia To Enforce Remedies for Violations of Basic Rights

The March 1992 Basic Law of Government formally recognizes the principle of an independent judiciary for the first time in Saudi Arabia. However, Middle East Watch has continued to receive reports from within the judiciary that judges periodically come under pressure from senior members of the royal family and other government officials, and thus still do not feel free to check official abuse of power. As the State Department noted in its most recent *Country Reports*, "Jurists are . . . aware and reportedly have on occasion acceded to the power and influence of the royal family and their associates." *Id.* at 1579. Moreover, under the Saudi government's interpretation of the Shari`a, the king is the spiritual as well as temporal head of the community (*waliyy al-amr*) and thus has broad discretion to overrule judicial decisions.

Since 1955 Saudi Arabia has had an administrative court, the Board of Grievances, which theoretically can contest government decisions. However, the Board regularly defers to the wishes of the Council of Ministers and the King. According to Article 15 of its 1982 charter, its "judges" can be removed by the King at any time.

Middle East Watch knows of no incident in which the Board of Grievances has provided a victim redress against a Saudi government agency or official accused of torture, mistreatment of prisoners, or unlawful detention. A former senior official of the Board of Grievances interviewed by Middle East Watch in June 1992 also could not recall a single such case. Nelson thus is virtually precluded from obtaining civil redress in Saudi Arabia for his alleged torture and arbitrary detention. Given his

recruitment in the United States, his only realistic recourse is in U.S. courts.

Conclusion

The order of the Court of Appeals should be affirmed and the case remanded to the District Court for further proceedings.

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